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# INTERNATIONAL LAW

WITH

ILLUSTRATIVE CASES

Dec. 14

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BY

EDWIN MAXEY, M. DIP., D.C.L., LL.D.

Professor of Constitutional and International Law, Law Department,  
West Virginia University.

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**TO MY OLD PRECEPTOR, JUSTICE DAVID J. BREWER,  
THIS VOLUME IS RESPECTFULLY INSCRIBED.**





## PREFACE.

The author has been led to the writing of this volume on international law by his experience of some years in teaching the subject. This experience forced upon him the conclusion that while there were many excellent treatises on international law, there were none which conformed to the needs of the class-room. Being thoroughly convinced that no satisfactory course can be given without ready access to leading cases, and, being equally well convinced that the average student can hardly be expected to, and will not, buy a collection of cases to supplement his text, the plan of combining text and cases seemed to be the most practicable way out of the difficulty. While, therefore, the work has been written primarily to meet the needs of the student, it is abundantly clear that the cases cannot but increase the value of the work to the practitioner and to the general reader. The emphasis has been thrown upon peace and neutrality because of the conviction that the real interests of nations are in peace rather than war, and that time can be more profitably spent in a study of the means of avoiding strife than in elaborating the rules for regulating it. Care has been taken to include in so far as possible the results of recent developments and changes in international law.

References to Robinson's Admiralty Reports are to the American edition 1800-1810.

Especial gratitude is due to Prof. H. S. Green for reading the proof-sheets.

EDWIN MAXEY.

Morgantown, W. Va.

Jan. 1, 1906.

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# INTERNATIONAL LAW.

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## PART I. HISTORICAL DEVELOPMENT.

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### CHAPTER I. BEFORE GROTIUS.

In common with all other sciences, international law did not spring suddenly into existence like Minerva, full-grown from the head of Jove; but has developed slowly—in fact, all too slowly. While the germs of it are to be found in the first transactions between political communities, it was a long time before the rules found to be useful in governing such intercourse were crystallized into a science. Nor are there wanting those who still insist that international law is not yet entitled to be dignified by the term science. To such it appears to be not law at all, but merely international comity

This, however, is simply a matter of definition. It would of course not be difficult to frame a definition of law which would cut out international law, as indeed certain of the older definitions of law do. Yet, when we have done this, we have accomplished nothing. We have merely cut out a term which is convenient and which conforms better with the facts than any yet offered as a substitute. When a definition fails to conform with the facts, it is always more logical to amend the definition than to modify the facts. And whatever may have been true of

earlier times, it seems clear that at present the definition of law adhered to by Austin and others needs amending in order to put it into conformity with the facts. Undoubtedly there are differences between international law and municipal law, just as there are differences between municipal law and physical law, but this does not prove that the former is not law. Punishment does not always follow a violation of international law; neither does it always follow a violation of municipal law. In this, both differ from physical law. The objection that there is no international court, for the purpose of determining upon violations of international law, no longer holds. True, there is the absence of a regularly organized international police force, yet this does not seem to be inconsistent with the existence of international law. One would indeed be rash to argue that if we were to abolish the police force we would thereby abolish municipal law.

#### SECTION I. INTERNATIONAL LAW AMONG THE GREEKS.

The Greek city-state.

But, far more interesting than the matter of definition is the evolution of international law, as we find it to-day. And in attempting to trace this development there is not much to be gained by going back further than the Greek city-state. Here we find a village community organized in common with all Aryan states upon the basis of the family as a unit. These village communities, though small, possessed the essential characteristics of states. For a time at least, these political communities dealt with each other as independent states, and the rules which governed these dealings differed widely from the rules applied in their dealings with other nations. It was easy enough for them to understand that another Greek state could be the subject of rights which all were bound to respect, but that barbarians were the subjects of rights was by no means equally clear. With the Greeks, therefore, inter-

national law was for a long time a code of rules mainly for the purpose of governing their relations with each other. The Amphictyonic Council served to some extent as an international court for the purpose of settling controversies between the independent Greek states. But as other nations were in no way represented in it, it had no power to settle differences between Greek and other independent states.

Even between themselves the rules of international law developed by the Greeks were very limited in their scope. They were chiefly for the purposes of governing them, in a relation of war, though we find rules as to the right of refuge in sanctuaries, the inviolability of those journeying to places of public worship and the Hellenic games, also the inviolability of heralds and envoys. The rules of war were extremely harsh. Prisoners of war might be lawfully put to death or reduced to slavery, unless an express agreement to the contrary were contained in the terms of surrender, and the same was true of all the non-combatants of a conquered city.

Limited scope  
of Greek rules  
of Int. law.

With the unification of the Greek city-states into an empire, this part of their international law came to an end, and we have now left only the other phase of their international law, viz.: the rules governing their relations with the barbarians. This period has little in it to note and was of brief duration as the Roman conquest brought the independent existence of Greece to an end.

## SECTION II. INTERNATIONAL LAW AMONG THE ROMANS.

Turning from Greece to Rome we find much that forms the ground-work for international law but very little that could properly be called public international law. How greatly we are indebted to the splendid system of jurisprudence, which has been Rome's enduring contribution to the world, for those principles which have furnished the raw

material out of which our present system of international law has been constructed we may never know. But certain it is that the great text-writers and also the courts which have exercised the greatest influence in the development of international law have drawn much of their inspiration, and not a little of their material from Roman law.

**The *jus gentium* was private Int. law.** In the *jus gentium*, which was the system of law developed by the *praeter peregrinus*, there is a departure from the *jus civile* which tends strongly towards international law proper. If, however, we examine the duties of the *praeter peregrinus*, we find that his jurisdiction was over cases arising between foreigners, or between Roman citizens and foreigners, or between the citizens of the different parts of the Empire outside of Rome. The body of rules thus developed would clearly be private international law and not international law proper, which deals with the relations of states rather than with the relations of individuals. Yet the *jus gentium* gradually came to be identified with the *jus naturale* which was the embodiment of right reason and therefore a proper source of the *jus inter gentes*.

**The *jus fetiale*.** The *jus fetiale* was a part of international law proper as it dealt with the relations of Rome with other states. But it covered a very narrow field. It was the law governing the functions of the College of heralds. The ceremonies prescribed by it were formal in the extreme. One or more of the members of the College of heralds (*Collegium fetialium*) would go to the borders of the offending state, and, having crossed the boundary line, the spokesman, *pater patratus*, would make a very formal demand for reparation. Three and thirty days were allowed in which to reach a decision, at the end of which time, if a satisfactory settlement were not made, the herald went again to the border and hurled a bloody lance into the enemy's country as a visible sign that hostilities had begun. Without these formalities, war could not lawfully be instituted. But as

the field of operations widened and there was not a corresponding increase in the facilities for travel, the practice was modified so that instead of sending the herald to the border to hurl the lance he was allowed to hurl it in the direction of the hostile state, from a pillar near the temple of Bellona. As these formalities have long since become obsolete the fetial law has to a great extent lost its meaning and is at least not a fruitful source of international law. Why this branch of the Roman law should ever have been confused with the *jus gentium* is most difficult to understand. Yet it has been, by such careful writers as Wheaton and Calvo. The *jus gentium* had to do with private rights only and the *jus fetiale* dealt only with public rights and particularly with the laws of war.

With all the facts in view it is not difficult to reach the conclusion that Rome did not do much in the actual development of a system of international law. This was certainly not because they lacked the genius to do so or because there were wanting in their civil law those principles of equity which are the life-blood of international law. It was due largely to the fact that during a considerable portion of its national existence it was, in theory at least, a universal empire and hence recognized no need of a system of international law as there were no other states with whom she could enter into relations.

### SECTION III. INTERNATIONAL LAW IN THE MIDDLE AGES.

Had the disintegration of the Roman Empire been followed immediately by the development of independent nations it would have necessitated the development of a system of international law about a thousand years earlier than has been the case. But the Holy Roman Empire prevented such development by perpetuating the idea of a universal Empire, for so long as this idea was dominant there was no room for international law. Hence it was

The Holy  
Roman Empire  
and its effect  
upon Int. law.

not until the Reformation had broken up this idea that the conditions were present for the development of a system of international law.

There were, however, during the Middle Ages, some moves in the direction of formulating a body of rules which formed a part of international law, and some progress was made. The growth of commerce had rendered necessary certain rules governing the rights of nations upon the sea. These rules were in course of time formulated into codes. The earliest of these maritime codes is the "*Jugemens d'Oleron*," adopted first by the merchants of France, England, and Spain; and later by the Netherlands and the provinces bordering on the Baltic. Better known and more elaborate than the "*Jugemens d'Oleron*" is the "*Consolato del Mare*" compiled at Barcelona about the middle of the fourteenth century and accepted generally by all the maritime powers. Concerning the need and source of this code, Wheaton says: "Maritime war, during the Middle Ages, was identified with piracy by the cruel and barbarous manner in which it was carried on without discrimination of friend or foe. The first attempt to give laws to the practice of warfare at sea may be traced in that curious and venerable monument of all jurisprudence, the *Consolato del Mare*. The learned researches of M. Pardessus have satisfactorily referred the compilation of this collection of maritime precedents, in point of time to the latter part of the fourteenth century, and of locality to the flourishing city of Barcelona. This compilation ought not, according to this writer, to be considered as a code of maritime laws promulgated by the legislative authority of one or of several nations, but as a record of the customs and usages received as law by the various commercial communities bordering on the Mediterranean. Whoever were the authors of the compilation, whether it is to be attributed



to public or private authority, its compilation must doubtless be referred to the same causes which produced the publication of that collection of maritime customs and usages of the nations bordering on the western seas, called the *Jugemens* or *Roles d'Oleron*. These written codes contained, besides a great number of local ordinances embracing regulations of positive institution, many general rules and principles which time had gradually consecrated in the practice of Mediterranean commerce. Its perfect simplicity and the wisdom and equity of its decisions caused it to be adopted by all the maritime states bordering on the Mediterranean Sea as supplementary to their own local laws and usages. It embraces not only the elementary rules for the decision of controversies growing out of civil contracts relating to trade and navigation in time of peace, but it expounds the leading principles then recognized as to belligerent and neutral rights." Thus, to use the phrase of David J. Hill, "it was in the cradle of commerce that international law awoke to consciousness."

Among the writers on international law preceding Grotius were: Vasquez, a Spanish monk, who put forth the doctrine of the existence of a group of free States which were the subjects of reciprocal rights irrespective of the will of a world-empire, whether temporal or ecclesiastical. This was good doctrine so far as it went, but it lacked in clearness, for he identified these rights with the *jus naturale* and as there was no agreement as to what constituted the *jus naturale* his system was fatally lacking in definiteness. Yet for its time, 1564, the idea was undoubtedly an advance.

It was followed by the theory of Suarez which set forth the doctrine of the existence of a law of nations resting upon custom. Of him Wheaton says: "This Spanish Jesuit has the merit of having clearly conceived, and expressed, even at that early day, in his treatise *De Legi-*

Writers preceding Grotius.

Vasquez.

Suarez.

busac deo Legislatore, the distinction between what is commonly called the law of nature and the conventional rules of intercourse among nations." (History of Law of Nations, p. 35.) Equally appreciative of the contribution of Suarez is Sir James Mackintosh, in whose work on the Progress of Ethical Philosophy we find the following: "He first saw that international law was composed not only of simple principles of justice applied to intercourse between states, but of those usages long observed in that intercourse by the European race, which have since been more exactly distinguished as the consuetudinary law of the Christian nations of European and America." (Progress of Ethical Philosophy, p. 51.) Somewhat more definite was the treatise of Ayala, Judge Advocate to the Spanish army in the Netherlands, on "De Jure et Officiis Belli" which was in part historical and in part judicial. The work of Conrad Brunus, a German writer on the rights and duties of ambassadors, is perhaps worthy of mention. It was written in Latin under the title "De Legationibus." He considers that embassies had their origin in the custom of employing heralds for the purposes of announcing war. That ambassadors were exempt from the jurisdiction of the local courts, both as to civil and criminal matters, he did not hesitate to assert, though admitting that their immunities had not always been respected.

Ayala.

But greater than any of the other writers preceding Grotius was Albericus Gentilis, an Italian professor of jurisprudence and lecturer at Oxford. His "De Legationibus" was published in 1583, and his "De Jure Belli" in 1589. His work was an attempt to adjust the principles of the *jus naturale* to the new fact of territorial sovereignty. It was a forerunner of the greater work along the same line by Grotius. His outline is very similar to that of Grotius. In fact the titles of his chapters are

Gentilis.

almost identical with those of the first and third books of the latter. Of him, his fellow countryman, Lampredi, says: "He first explained the rules of war and peace, which probably suggested to Grotius the idea of writing his own work."

## CHAPTER II.

### FROM GROTIUS TO AMERICAN INDEPENDENCE.

The writings of Grotius certainly mark an epoch in the development of international law. It may not be entirely accurate to call him "the Father of the Law of Nations," but it is entirely accurate to say that his "*De Jure Belli ac Pacis*" has done more than any other treatise toward awakening public interest in and giving systematic form to the body of rules which constitute international law. This was due partly to the spirit of intense earnestness which pervades his work and partly to the fact that the time was ripe for its reception. Much that is contained in the works of Grotius had already been set forth by Gentilis, but whether it was the fault of his style or a lack of proper appreciation upon the part of those whom he addressed, the fact is that he did not secure the public ear as did Grotius. The first edition of the *De Jure Belli ac Pacis* was quickly exhausted. Successive editions appeared in Paris, Frankfort, and Amsterdam. So thoroughly was the public aroused over the subject that he almost succeeded in making international law a topic of conversation in polite society.

Effect of  
Grotius's writ-  
ings.

His twofold  
basis of Int. law.

He makes international law rest upon the law of nature, and consent. This twofold basis is an advance for which he is entitled to much credit. In the latter he has hit upon the real basis of international law, and by not discarding the law of nature as a basis he secured a more ready acceptance of his ideas. For it must not be forgotten that Grotius was writing at a time when abstract reasoning seemed far more learned and took hold of men's minds more forcibly than did an appeal to facts. Thus the really

weak part of his work, instead of being a hindrance to the acceptance of his system, helped to float it along.

Though driven to the writing of his book by "the licentiousness in regard to war, which even barbarous nations ought to be ashamed of; a running to war upon very frivolous or rather no occasion; which being once taken up, there remained no longer any reverence for right either divine or human, just as if from that time men were authorized and firmly resolved to commit all manner of crimes without restraint," he did not enter upon a useless tirade upon all war. He pursued rather the practical method of inquiring what wars, if any, were lawful? In other words, what causes justified war; and in case of a just war what rules should apply? He emphasized the fact that peace was the normal relation of states; and recognized the further facts, which few men of his time did, that the Holy Roman Empire had passed away and that the civilized world was now made up of independent states. The legal recognition of this fact is to be found in the Peace of Westphalia, 1648. To the mind of Grotius the only superior to which these were now subject was the "divine and human law." It was their obligation to conform to this, which as a binding force was to take the place of the Empire and to do what it had failed to do — maintain the peace of the world, or, if not, at least tolerable conditions in war.

Independent  
states subject  
only to divine  
and human law.

The work of Grotius has not failed to receive its share of criticism, some of which has been intemperately adverse. In referring to this Sir James Mackintosh says: "Few works were more celebrated than that of Grotius in his own days, and in the age which succeeded. It has, however, been the fashion of the last half century to depreciate his work as a shapeless compilation, in which reason lies buried under a mass of authorities and quotations. This fashion originated among French wits and declaimers, and it has

been, I know not for what reason, adopted, though with far greater moderation and decency, by some respectable writers among ourselves. As to those who first used this language, the most candid supposition we can make with reference to them is that they have never read the work; for, if they had not been deterred from the perusal of it by the formidable array of Greek characters they must soon have discovered that Grotius never quotes on any subject till he has first appealed to some principles, and often, in my humble opinion, though not always, to the soundest and most rational principles." (Discourse, p. 22.) The achievements of Grotius were, on the scientific side, the discovery of a more definite basis for international law and of a substitute for the Holy Roman Empire which possessed its advantages without its disadvantages; on the practical side, by emphasizing the desirability of peace, even from the standpoint of interest, and by pointing out the ways of ameliorating to some extent the harsh conditions of war he gave an impetus to a movement which has continued to operate to the present day, and, though it has not accomplished all he intended, has nevertheless accomplished much.

**The disciples of  
Grotius.**

As was natural, Grotius had a number of disciples. Among these were Puffendorf, who, unfortunately, expended his energies in developing the wrong part of his master's work. Concerning his writings, Wheaton justly says: "A very small part of his work is occupied with the rules which govern, or ought to govern, the intercourse of the independent communities which acknowledge no common superior but the supreme governor of the universe. The rest of it is employed with the exposition not only of the rules of justice, including the respective rights and obligations of sovereign and subject, but of all the other duties of public and private morality." (History of Law of Nations, p. 96.) He attempted to prove the identity of the law of nature with that of the law of nations. His

**Puffendorf.**

work was therefore retrograde rather than progressive in character. It succeeded in doing little except dividing the German publicists into two schools, viz., those who "denied altogether the existence of any other law of nations than the law of nature applied to independent communities," and those who under the lead of Rachel adhered to the advanced phase of the theory of Grotius, that consent, as shown in usage and express compact, furnishes the foundation for the law of nations.

But a trifle later than Grotius, of whom he was little more than a slavish follower, was the English writer Zouch, whose chief claim to distinction rests upon his being the first to use the term *jus inter gentes* instead of *jus gentium* as the proper designation for international law. His contemporary Selden was a reactionary who is remembered for his authorship of the *Mare Clausum* published as a reply to the *Mare Liberum* of Grotius, which appeared the preceding year (1634). His *Mare Clausum*, in common with all the works of Selden, exhibited great learning. It was written to justify England's pretensions to sovereignty over the seas surrounding the British Isles, and, so far as precedents were concerned, it had a broader basis upon which to rest than did the work of Grotius to which it was a reply. But it failed to convince in that it breathed the spirit of the old rather than the new order of things. The necessities of a growing commerce had rendered a revision of the old rule advisable, and therefore the contention of Grotius had expediency to recommend it. In a contest between expediency and precedents, it is never surprising if the former triumphs. A contemporary with these and of the same country was Sir Leoline Jenkins who was in many ways an able and judicial writer on international law and whose collection of the opinions in English maritime cases was the most valuable up to that time. While judge of the High Court of Admiralty his opinions commanded the

highest respect and were looked upon as the "testimony of a man who appears to have been not undeservedly regarded as an oracle in his department of law, and to have delivered his opinions with a candor and rectitude the more meritorious, as he served a sovereign who gave little encouragement to these virtues." (Madison, Examination of the British Doctrine which subjects to capture a Neutral Trade not open in time of Peace, p. 113, London Ed. 1806.)

**Bynkershoek.**

A Dutch publicist of note about a century later than Grotius is Bynkershoek. He agrees substantially with Grotius as to the foundation of international law, placing it on "ratione et usu;" but disagrees with him as to the dominion which nations may have over the sea. His view as to the latter is much nearer to the one at present held than was that of Grotius. Unlike Puffendorf, Bynkershoek was not given to speculation but was a writer of an intensely practical turn of mind. Instead of attempting to cover the whole field of law, he addressed himself especially to an examination of those questions which most often give rise to disputes between nations in their intercourse with each other. Accordingly we find in his *Quaestiones Juris Publici* a discussion of inestimable value to us in arriving at a conclusion as to what was the law of his time with reference to a number of questions. In commenting upon this work, Wheaton says: Bynkershoek treats the important subject of belligerent and neutral relations, with more completeness, precision, and fullness of practical illustration than any of his predecessors, and indeed it may be said of his successors, among the public jurists. He is the first writer who has entered into a critical and systematical exposition of the law of nations on the subject of maritime commerce, between neutral and belligerent nations; and the plan which he adopted was well calculated to do justice to the subject." (History of Law of Nations, p. 193.) Important as this topic seems, we find that before his time



very little had been written upon it. To it, Grotius devotes but one short chapter and a section of another.

Though Leibnitz would not be classed as an interna-<sup>Leibnitz.</sup>tional law writer, his discussion of the law of nations in his general philosophical writings, and especially his preface to a collection of treaties and diplomatic acts which appeared in 1693, certainly exercised no inconsiderable influence upon the development of the subject. His preface was evidently intended as a commentary upon the general principles of the law of nations as it existed at that time, and as it should exist.

The essential ideas contributed by Leibnitz were elaborated by his disciple Wolf, who in his *Jus Gentium* divided <sup>Wolf.</sup> international law into: voluntary, conventional and consuetudinary. The first of these derives its force from the <sup>Voluntary, conventional, and consuetudinary</sup> "presumed" consent of nations, the second from their <sup>Int. Law.</sup> express consent and the third from their tacit consent. However profound the writings of Wolf, they were written in a style that was by no means popular. Before they could exercise the influence to which their merit entitled them they must wait for the pen of Vattel to translate them from the language of geometry into the language of the crowd.

But of far more influence upon the development of in-<sup>Vattel.</sup>ternational law than his popularizing of Wolfian theories was his contention in behalf of a juster recognition of the rights and duties of neutrals. Whatever may be thought of the former, the latter was a practical and much needed work—a work for which he is entitled to the gratitude of succeeding generations. A more extended discussion of his views and what he accomplished in behalf of a stricter neutrality will be more properly reserved for a later chapter.

During this period there were a number of important treaties, chief among which is that of Utrecht, 1713. <sup>Treaty of Utrecht.</sup> With the territorial arrangements of this treaty we are not

concerned here, as that is a question of politics and not of law. But the fact that the treaty went a long way toward securing a better recognition of the rights of neutral commerce, particularly of the principle free ships, free goods, is certainly a matter of interest to one who is studying the development of international law. The commerce provisions of this treaty were allowed to expire by limitation, but were revived by the treaty of Paris, 1763.

**Rule of 1756.**

The rule of 1756 which forbid neutrals carrying goods from one to another of the enemy ports or to engage in a commerce during war from which they had been excluded during peace, was to some extent retrograde in character. During the wars in which several of the European countries were participants, this rule was most injurious to American commerce and especially to our carrying-trade. Particularly was this true under the extensions of the rule during the Napoleonic wars.

### CHAPTER III.

#### FROM AMERICAN INDEPENDENCE TO THE PRESENT TIME.

The advent of the United States as an independent nation marks the beginning of a new epoch in the development of international law. From that point on, the voice of Europe, though entitled to due weight, is by no means final as to what is international law. Even from the beginning of her national existence, the United States has been a factor to be reckoned with in international relations. For, while never inclined to officiously dictate rules to Europe, she has never shrunk from the maintenance of her own rights. By such insistence, she has played no inconsiderable part in the destruction of that enemy of all international law—piracy, and in securing a better recognition of neutral rights.

*The United States as a factor in the development of International Law.*

With the beginning of this period we find also the advent of the positive school. The title of father of this school is usually ascribed to Moser, a German publicist whose works appeared in 1781. To his mind the work of the writer on international law was simply to find out and report what rules had been established by treaties and usage, and, having done this, he had then discovered to himself and to others what constituted the international law of that time.

*The positive school — Moser.*

Contemporary with him and holding what were in many ways similar views was Professor Martens, of the University of Gottingen. He published in 1788 a summary of the International Law of Modern Europe Founded on Treaties and Usage. This is in many ways an able work and was influential from the start. But of greater service was his collection of Treaties of Peace, Alliance, etc.,

*Martens.*

published in 1791. This work has been extended by his successors — C. Martens, Saal-feld, Murhard, Samwer, Hopf and Stoerk — until in 1887 it contained sixty-four volumes.

**The Cong. of  
Vienna.**

Most potent in its influence upon the development of international law was the Congress of Vienna. By restoring the balance of power which had been rudely disturbed by the Napoleonic wars it restored the conditions essential to the healthy development of international law. It needs no great stretch of imagination to see that had the Congress of Vienna reconstructed the map of Europe so as to leave one predominant and the others weak powers, the recognition of international rights would have been much more difficult to secure, which is but another way of saying that the international law of to-day would have been a vastly different thing. In addition to its recognition of the principle of the balance of power and its reconstruction of the map of Europe in accordance therewith, the Congress of Vienna accomplished no small amount in the direction of rendering more free the navigation of rivers. It may be worth mentioning that its classification of diplomatic agents is substantially the same as we have to-day.

**Congress of  
Verona.**

Within less than a decade after the Congress of Vienna, but by no means as important as it, was the Congress of Verona. This deserves mention not so much for what it did toward influencing the development of international law as for what it failed to do. Had the spirit of absolutism which was the breath of life of this Congress triumphed, it needs no seer to reach the conclusion that certain of the most fundamental rights of states would have been ruthlessly swept away. The possession of international law rights would under the regime of a triumphant Holy Alliance have rested not upon the fact of being an independent state but upon conformity to the standard of orthodoxy.

The same year as the Congress of Vienna, Wheaton's Law of Marine Captures was published. This was the only really important treatise during the first quarter of the 19th century. It was followed in 1836 by the Elements of <sup>Wheaton.</sup> International Law. In 1845 his History of the Law of Nations in Europe and America was published. These works gave him the position of primacy among American writers on international law. This position he held for the remainder of the century, and at present the only writer who has a just claim to dispute with him the title is Hannis Taylor, whose learned treatise on International Public Law was published in 1901.

Well deserving of mention among the works which have exercised a formative influence upon the development of <sup>Kent.</sup> international law are Kent's Commentaries and the opinions <sup>Story.</sup> of Justice Story on questions of admiralty law. During his twenty years (1812-1832) on the Bench of the Supreme Court of the United States he was recognized as its ablest authority in this department of law. Nor do the ability and influence of his opinions along this line suffer by comparison with those of Sir William Scott, afterwards Lord Stowell, England's greatest admiralty judge, or with those of Portalis, the premier of French admiralty jurists.

In 1839 appeared Manning's Commentaries on the Law of <sup>Manning.</sup> Nations. In these the writer, an Englishman, gives special <sup>Hefter.</sup> attention to the laws of neutrality. In 1844, Hefter, a German publicist of note, published his European International Law of the Future. The next year appeared an able treatise on the International Rules and Diplomacy of the Sea, by <sup>Ortolan.</sup> Ortolan, a French publicist. In 1847 <sup>Burlamqui.</sup> Burlamqui, a Swiss writer, published his Principles of Natural Law and of the Law of Nations. In 1854, <sup>Phillimore.</sup> Phillimore, an English Judge, published his Commentaries on International Law. <sup>Hautefeuille.</sup> Hautefeuille's History of the Origin, Progress and Variations of Maritime International Law appeared in 1858.

**Congress of  
Paris, 1856.**

In 1856, the Congress of Paris met for the purpose of settling the questions arising out of the Crimean War. It did that; but it did more, and it is with this surplus that we are at present concerned. It promulgated these four great rules of international law: (1) "Privateering is and remains abolished. (2) The neutral flag covers enemy's goods, with the exception of contraband of war. (3) Neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag. (4) Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy."

**Attitude of the  
United States to-  
ward the rules  
of the Congress  
of Paris.**

Though the United States is not a signatory to this declaration, she had from the beginning of her national existence contended for the last three principles set forth in it. She further offered, through her Secretary of State, Marcy, to give her adherence to the first, provided the other powers would agree to the proposition that all private property at sea, contraband excepted, is exempt from capture. Had this counter proposition been accepted, it would have been an immense advance, as it would have placed private property on sea upon the same basis as that upon land. A more extended discussion of this and the other rules will be found in succeeding chapters.

**Admission  
of Turkey into  
the family of  
nations.**

Another act of the Congress of Paris which has not been without significance in the development of international law is its recognition of Turkey as a member of the family of nations. This, while intended as a means of protecting her against Russia, has proven costly in its consequences. It was the placing in her hands of a club which she has used not only against Russia, but also against the other nations, and even against her own citizens as well. Neither has the way she has used it been well-calculated to reflect credit upon the wisdom of those who placed it in her hands.

In 1860, Woolsey, for years a professor of International Law in Yale University, published his concise work entitled an "Introduction to the Study of International Law." This is certainly among the most instructive of the briefer works and in consequence of this has had a wider use as a text-book in colleges than any other text on the subject of International Law. The following year General Halleck published his work on "International Law, or Rules Regulating the Intercourse of States in Peace and War"; which, partly because of its merit, but more perhaps because of his position in the army, attracted a great deal of attention at the time.

The same year Twiss, a Professor of Civil Law at Oxford, published his Law of Nations Considered as Independent Political Communities, and two years later his Rights and Duties of Nations in Time of War. The same year, Dr. Lieber of Columbia University, compiled at the request of the United States government, a code of the rules of war.

The next year the Conference of Geneva adopted a set of rules regulating the treatment of the sick and wounded, of surgeons, chaplains, nurses, hospitals, ambulances, etc., in short, the protection of those persons and things which, though with every army, do not constitute a part of the fighting force, and by the dictates of humanity are exempted, in so far as possible, from hostile attack. These rules, modified and extended by subsequent conferences, have come to be known as the Red Cross rules.

In 1868, Calvo published his "Le Droit International Theoretique et Practique." This work is worthy of mention, partly because of its intrinsic merit and partly because the writer is, with the exception of Bello, whose works are almost unknown, the only writer on international law South America has produced. Though published originally in Spanish, it has been translated into French. The bulk of

the work was written in Washington while the author was there as minister from Paraguay. It bears the impress of American thought.

**Geneva Arbitration.**

The Geneva Arbitration must not be overlooked in a consideration of the development of international law. For its influence in behalf of a stricter observance of the duties of neutrals has been of almost immeasurable value. Though much of the credit for the award is due to the diplomats who framed the principles laid down in the Treaty of Washington for the guidance of the arbitrators, no treaty could have given the same publicity to the matter as did the decision of the international board of arbitrators. This added the sanction of an impartial court to the work of a High Commission. It also gave a needed impetus to the application of the principle of arbitration to the settlement of international controversies. The rapid growth of international arbitration, if indeed it may be said to have had a rapid growth, dates from this event.

**Field's Code.**

The next year David Dudley Field of the New York Bar published his Draft Outline of a Code of International Law. As we have already seen, maritime codes had been put forth centuries before this, but those were codifications of simply a small part of international law. Field's was the first attempt at a comprehensive codification of the whole of international law. His purpose was "to bring together whatever was good in the present body of public law, to leave out what seemed obsolete, unprofitable or hurtful, and then to add such new provisions as seemed most desirable." Such a codification would undoubtedly have its advantages, if all, or practically all, of the civilized nations would agree to it. Neither would such a proceeding be *a priori* impossible. For, as Field argues in his preface to the second edition, if sixteen nations could agree, as they had, to a postal treaty, which was in effect a chapter of a code, why could they not agree upon an entire code?"



But great as would be its advantages, it would not be without its disadvantages. These would be the same as in all codifications—a tendency toward rigidity; in other words, a lack of that flexibility which is needed in order that law may respond to changed ethical conceptions and economic conditions. Yet Field's code, though it has thus far failed of adoption by the nations, so as to convert it from the findings and views of one man into the law of nations, did set at least some of the nations to thinking and hence was by no means unfruitful of results. The year following the publication of the first edition, there was formed at Brussels the Association for the Reform and Codification of the Law of Nations; and at Ghent, the Institute of International Law, founded for the purpose of furthering the "progress of international law, formulating its general principles, and giving assistance to any serious endeavor for its gradual and progressive codification."

In 1878, Bluntschli, a Swiss publicist and professor at Zurich, published his "Modern Institutional Law of Civilized States." He is in many ways an exceptionally able writer, but is theoretical rather than practical. This may be judged from his definition of international law: "that recognized universal law of nature which binds different states together in a humane jural society, and which also secures to the members of different states a common protection of law for their general human and international rights." The same conclusion might be reached from his insistence that whatever is "a hindrance to the true development of a state constitutes a just cause of war." But what is the "*true development*" of a state? If each state is to judge for itself, then the limitation amounts to nothing. The chief practical value of his writings consists in the influence they have had toward the adoption of more humane rules of war.

In 1884, Hall published the first edition of his Inter-

national Law. This may safely be said to be one of the greatest works on the subject published during the 19th century; neither is there much doubt that it has no peer among the texts on this subject written by Englishmen. Within eleven years after its first appearance it had reached the fourth edition, which to a work of this character is no small compliment, and is likewise strong evidence of the interest which during the last quarter century has been aroused in the subject of international law.

Between 1886 and the end of the century there appeared Wharton's Digest of International Law, which in its way is a most useful work; Davis's International Law; a Treatise on International Law, in three volumes, by Fedor Fedorovitch Martens, who is by all odds the ablest of Russian publicists and who, by reason of his attainments, has been styled "The Lord Chief Justice of Christendom"; Snow's Cases on International Law, which form a very convenient collection of leading cases; the Principles of International Law, a most able treatise by Lawrence, an Englishman; Studies of International Law, by Holland, another English publicist and among the ablest of the positive school. In 1901 Taylor published his International Public Law, which is a most able and exhaustive contribution to the literature of the subject.

During the last year of the 19th century there occurred an epoch-making event in the development of international law, — the organization of a permanent international court of arbitration at The Hague, with power to determine its own jurisdiction. This placed international arbitration upon a new and more substantial basis and by so doing made it an increased factor in preserving the peace of the world. True, we had had successful cases of the application of arbitration to the settlement of international disputes before the establishment of this court, but the existence of such a court makes a resort to arbitration much

Wharton.  
Davis.

Martens.

Snow.

Lawrence.  
Holland.  
Taylor.

Convention at  
The Hague.

Advantages of  
an Internat.  
Court.

easier and thus increases the obligation of states to try this means of adjusting their differences before appealing to the harsh and exceedingly expensive arbitrament of the sword. Perhaps no better illustration could be had of the advantage of having a court standing ready to settle controversies arising between nations than the recent North Sea incident, which brought England and Russia to within hailing distance of war. And it is at least doubtful if a peaceful settlement would have been reached but for the existence of the court at The Hague. Such occurrences always arouse public sentiment to a pitch where delays are very likely to be fatal to a peaceful adjustment; so that if the machinery necessary to a legal hearing and decision on the merits of the case has to be constructed, the delay thus necessitated multiplies the chances of war. It is true that a submission of disputes to this court is not compulsory, but the enlightened public opinion of the world and the ever-increasing conviction as to the advantages of this form of settlement over an appeal to force will in course of time amount to compulsion in the vast majority, if not in all cases.

## PART II.

### SOURCES OF INTERNATIONAL LAW.

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#### CHAPTER I.

##### TREATIES.

As consent is the basis of international law, and as a treaty is one of the most binding forms in which a state can express its consent we naturally look to treaties as one of the sources of international law. And we are necessarily concerned with valid treaties, for invalid treaties cannot well be the source of anything, except dispute. What then constitutes a valid treaty?

**Validity of treaties.**  
**Parties.** A treaty, in common with all other forms of contract, must have parties of legal capacity. The only parties having legal capacity for this purpose are independent states. The consent need not be such as is necessary to the validity of a contract between individuals. In the latter case, duress renders the contract voidable, but not so in the case of treaties. Treaties made at the close of wars are usually made under duress, but so long as that duress is not applied to the person of the individual negotiating the treaty it does not affect the validity of the treaty. We do not need to go far for examples in support of this proposition—the treaty between France and Germany at the close of the Franco-Prussian war was undoubtedly made under duress, so was our treaty with Spain at the end of the Spanish-American war, but no one would question their validity on that ground. The code of ethics between nations has in this respect trailed behind that governing individuals.

Fraud vitiates a treaty as it does a contract between individuals. If, for instance, in the negotiating of a boundary treaty the consent of one of the parties to a particular line were given upon the basis of a forged map offered by the other party as genuine, knowing it to be forged, the treaty would be voidable at the option of the deceived party, as soon as the facts were known. Effect of fraud.

The question of consideration need not be considered in determining the validity of a treaty. As in the case of contracts of record, consideration is conclusively presumed. Consideration.

The object for which a treaty is entered into must be legal. Thus a treaty for the purpose of rendering piracy lawful or giving to any nation the exclusive jurisdiction over the high seas would be so out of conformity with the well-settled principles of international law as to be void. Legality of object.

A treaty to be valid must be entered into by an agent having sufficient authority or else ratified by the treaty-making power within the state. Though formerly it was not at all uncommon for treaties to be negotiated directly by sovereigns so that whenever an agreement was reached by them the treaty was complete and binding, it is now almost the invariable rule to have the treaty negotiated by either a special envoy or through the department of foreign affairs and before the result of their labor becomes binding it must be ratified. In the United States, all treaties must be ratified by a two-third majority of the Senate before they become binding. Power of agent.  
Ratification of treaties.

No special form is necessary to the validity of treaties. Though as a matter of practice, treaties are always committed to writing. Form of treaties.

But, given a valid treaty, to what extent is it a source of international law? This depends measurably upon the nature of the business concerning which the treaty is made; the importance and number of the parties to it; the purpose and working of the treaty. A treaty may be concern-

**Influence of  
treaties varies  
with subject-  
matter and par-  
ties.**

ing matters which are local and transitory, in which case it is of very little consequence when viewed from the standpoint of its influence upon international law. On the other hand it may be made with reference to matters which are of almost universal and permanent concern. We then have a treaty which may become a fruitful source of international law. Manifestly a treaty between minor powers such for instance as Hayti and Ecuador would not carry the same weight or be as great a factor in its influence upon, or in determining what is, international law, as would a treaty between Great Britain and Germany, even though the latter dealt with matters of considerably less importance in themselves. Now if in the latter case we add as signatories to the treaty the United States, France, Japan, Austria, and Italy, it is clear that the provisions of the treaty may practically be considered as a part of international law by virtue of the consent of so great a number of leading powers to be bound by them.

**Declaratory  
and creative  
treaties.**

If the provisions of the treaty are merely declaratory of what is already international law it is clear that they are, from our present standpoint, of far less importance than when they provide that as between the parties to the treaty certain actions shall be lawful concerning which international law had as yet been silent. Treaties of the first class merely add definiteness, whereas those of the second class are creative of international law; for, if originally entered into by a sufficient number of states, the new rules of conduct set forth in them become at once a part of international law. If, upon the other hand, they are originally entered into by but two states they become a part of international law as soon as experience shows their value and they are acquiesced in by other states.

Treaties may be so worded that they are evidently intended to be binding merely as between the parties thereto. In other words, treaties, as a rule, confer no

right upon any except signatories; but their wording may be such as to make it clear that at least some of their provisions will be considered as a statement of a rule of conduct not yet fully recognized as a part of international law but which will nevertheless be binding upon the parties in their relations with other states. An excellent illustration of this is to be found in the treaty between Great Britain and Russia. In discussing the provisions of it in a debate in Parliament, Lord Grenville said: "The third and fourth sections, those which treat of contraband of war and blockaded ports, do each of them expressly contain, not the concession of any special privilege henceforth to be enjoyed by the contracting parties only, but the recognition of a universal right, which, as such, cannot justly be refused to any other independent state. This third section which relates to contraband of war, is, in all its parts, strictly declaratory. It is introduced by a separate preamble announcing that its object is to prevent all ambiguity or misunderstanding as to what ought to be considered as 'contraband of war.' Conformably with this intention, the contracting parties declare in the body of the clause, what are the only commodities which they acknowledge as such. This clause must unquestionably be understood in that larger sense which is announced in its preamble, and which is expressed in the words of the declaration which it contains. It must be taken as laying down a general rule for all future discussions with any power whatever, on the subject of military or naval stores, and as establishing a principle of law which is to decide universally on the just interpretation of this technical term 'contraband of war.' \* \* \* On the whole, therefore, I have no doubt that neutral nations will be well warranted in construing this section as declaratory of general principles, and applicable to every case where contraband of war is not defined by special treaty, Nor could we, in my

Wording of  
treaties.

opinion, as the treaty now stands, contend in any future wars with any shadow of reason, much less with any hope of success against this interpretation, however destructive it might be of all our dearest interests." This line of reasoning is applicable to provisions of a treaty which are merely declaratory of what is international law and to those which record the conviction of their signatories as to what should be international law. In both cases the declarations may operate as an estoppel, if the language is such as to warrant it. And whatever the language used, a state may be estopped from denying that a certain rule is binding upon it, if that rule is found in practically all of its treaties.



## CHAPTER II.

### DECISIONS OF COURTS.

As in the case of the common law the decisions of the courts were not only a register of what was already law, but also by their interpretations they actually made law, so the decisions of courts have been a not unimportant source of international law. In the latter case, however, <sup>Until recently</sup> we have up to very recent years had a situation very dif- <sup>no International-</sup>ferent from that of the common law. For in the case of <sup>al court.</sup> the common law, which was a national system, there were courts which could say, authoritatively, what was the law, whereas there were no such courts in the realm of international law. Questions of international law were of course passed upon by courts, but as these courts were national, not international, their decisions were not law for any other state than the one to which the court belonged. With the establishment of an international court, which is an achievement of the last few years, we have in the system of international law something corresponding to a supreme court in a national system. That this is a long step in advance and will lead to greater definiteness seems abundantly clear. For vitalizing this court, by submitting to it the Pious Fund case and securing the submission to it of the case of the *Allies v. Venezuela*, the United States is entitled to no small degree of credit.

Previous to the establishment of an international court, there existed in all countries some form of prize court. In fact such was a necessary concomitant of war, as each nation had a right to expect that its <sup>Prize courts.</sup> property should not be confiscated without a hearing. For otherwise the confiscations by belligerents would resemble too closely the act of pirates. The judges

in these prize courts occupy a most important and responsible position — a position which requires men of an eminently judicial temperament. For, when the passions of a nation are aroused by war it requires an exceptionally strong character and a mind dedicated to legal fairness to render a decision which contravenes, or seems to contravene, the immediate interests of the state whose majesty he represents. Perhaps no more exalted conception of the duties of such a judge has been expressed than that of Lord Stowell, to be found in his opinion in the case of the *Maria* : “In forming my judgment, I trust that it has not escaped my anxious recollection for one moment what it is that the duty of my station calls for from me ; namely, to consider myself as stationed here, not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference, that justice which the law of nations holds out, without distinction, to independent states, some happening to be neutral, and some to be belligerent. The seat of judicial authority is, indeed, locally here in the belligerent country, according to the known law and practice of nations, but the law itself has no locality. It is the duty of the person who sits here to determine the question exactly as he would determine the same question if sitting at Stockholm ; to assert no pretensions on the part of Great Britain which he would not allow to Sweden in the same circumstances and to impose no duties on Sweden, as a neutral country, which he would not admit to belong to Great Britain in the same character. If, therefore, I mistake the law in this matter, I mistake that which I consider, and which I mean should be considered, as the universal law upon the question.” The only criticism upon this, if criticism it be, is that it is an unattainable ideal.

Lord Stowell's  
view as to duty  
of prize court  
judge.

In considering the decisions of courts as a source of international law, there are always two things to be con-

sidered: 1st, the conclusion reached, and 2nd, the opinion of the judge, i. e., his reasoning and citations in support of his decision. Though from the standpoint of the litigants in a particular case, the former is by far the more important, for that determines their rights and titles; yet when we are considering the decision as a source of international law, the latter must never be lost sight of, for the weight of a decision with other courts is measurably in proportion to the convincing logic, and spirit of fairness pervading the opinion. It is their opinions and not simply the conclusions which they reached that stamped Lord Stowell and Justice Story as the greatest admiralty judges and made their decisions so great a factor in the development of international law.

Decisions and  
opinions.

It will be well at this point to notice briefly the organization of the admiralty courts in some of the leading states. In the United States, the original jurisdiction in admiralty causes is vested in the District Courts. A District Court is presided over by a single judge, who hears and decides causes without the aid of a jury. From the decision of a District judge there is a right of appeal to the Circuit Court and finally to the Supreme Court of the United States. There is this peculiarity about prize cases; the judge sitting in the District Court determines finally the title to the property in question, and, though his decision may be reversed by the Supreme Court, this does not disturb the title fixed by the decree of the prize court, which decree is recognized throughout the world as finally determining the title. The reversal simply throws upon the government the duty of making reparation to the injured party. Should Congress refuse to make any reparation the party has no recourse, except a resort to force.

Organization of  
admiralty  
courts in the  
United States.

In England, the prize court was a branch of the High Court of Admiralty. But by the Judicature Act of 1873, it was, with a number of other courts, consolidated into the

In England.

Supreme Court of Judicature. The division of the court which exercises the jurisdiction formerly exercised by the High Court of Admiralty is technically known as "Her Majesty's High Court of Justice." As in the United States, the English prize court is presided over by one judge who sits without a jury. From his decision there is an appeal to what was formerly known as the Judicial Committee of the Privy Council, but designated by the Judicature Act, already referred to, as "Her Majesty's Court of Appeal." It was as judge of the High Court of Admiralty during the stormy period of the Napoleonic wars, that Sir William Scott, afterwards Lord Stowell, rendered the justly famous series of decisions contained in the reports of C. Robinson, Edwards, Dodson, and Haggard, which for a long time were, in England, the main source of that branch of international law which has to do with maritime war, and have exercised a potent influence throughout Europe and America.

**Marshall's view  
as to influence  
of decisions of  
prize courts.**

In speaking of the relation between prize courts of different countries, particularly those of England and the United States, Justice Marshall says: "The decisions of the courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this. Without taking a comparative view of the justice or fairness of the rules established in the British courts and of those established in the courts of other nations, there are circumstances not to be excluded from consideration which give to those rules a claim to our attention that we cannot entirely disregard. The United States having, at one time, formed a component part of the British Empire, their prize law was our prize law. When we separated, it continued to be our prize law, so far as it was adapted to our circumstances and was not varied by the power which was capable of changing it. It will not be advanced, in

consequence of this former relation between the two countries, that any obvious misconstruction of public law made by the British courts will be considered as forming a rule for the American courts, or that any recent rules of the British courts are entitled to more respect than the recent rules of other countries. But a case professing to be decided on ancient principles will not be entirely disregarded, unless it be very unreasonable, or be founded on a construction rejected by other nations." (9 Cranch, 191.)

### CHAPTER III.

#### INTERNATIONAL CONGRESSES AND CONFERENCES.

Congress of  
Westphalia.

International congresses are co-eval with modern international law. With the Congress of Westphalia modern international law begins. If this congress did not create modern international law, it is at least safe to say that, by the recognition of independent states as the subjects of rights not derived from or subordinate to the Holy Roman Empire or the Papacy, it made our modern system of international law possible. The equality of states which is one of the cardinal principles of international law had its birth in the arrangements of this congress. In this and also in regard to the idea of territorial as against the personal character of sovereignty, the Congress of Westphalia crystallized into law the doctrines set forth by Grotius. It also made binding upon the signatories to it many of the more humane rules of war for which Grotius had contended. For instance, up to this time it had not been contrary to law for a belligerent to put to death men, women or children of the enemy who might be found within his dominions or be captured by him. Unless special stipulations were made for the ransom of prisoners of war who were in the possession of the enemy at the close of the war, they continued to be his property. In bringing about a change in this particular, the Congress of Westphalia rendered a practical service to humanity.

Congress of  
Utrecht.

The next really important international congress was that of Utrecht and this is of greatest importance from the political rather than from the legal standard. It did however lead to some advance in international law by establishing the modern rule that immovables taken from enemy subjects, should be returned to them at the close of the war.

The Congress of Vienna was a most important assembly in which practically all of Europe was represented. Its task was the reconstruction of the map of Europe, or in other words the restoration of the balance of power which had been destroyed by Napoleon. Though the balance of power in Europe cannot be said to be a matter of international law it was a tenet of political faith proclaimed by the Congress of Westphalia, renewed by the Congress of Utrecht, and reiterated with emphasis at Vienna. While, therefore, we should keep in mind that it is not a principle of international law, we should also not lose sight of the fact that it has profoundly affected the development of that law. Though the German Confederation created by this Congress has passed away, though the union of Holland and Belgium effected by it has been dissolved, though nearly every provision made by it has faded away, these arrangements lasted long enough to leave their impress upon international law. Among its permanent provisions are the rules for freer navigation of rivers, now a part of international law; and the neutralization of Switzerland.

The Congress of Paris (1856) has no doubt left more definite, tangible material for one seeking sources of international law than has any other Congress. The four great rules formulated by it constitute a permanent contribution to the law in regard to privateering, neutral commerce, and blockade. On each of these subjects its rules constitute a distinct advance. In fact, we have not, during the fifty years since they were enunciated, made any improvement upon them.

Of great practical effect in modifying the rules of war were the Conferences of Geneva and Brussels in 1864 and 1874, respectively. The word "Conference" is used to designate these meetings, yet the term "Congress" might have been used with equal propriety as there is no practical distinction between the two terms as used in international

Congress of Vienna.

Congress of Paris.

Conferences of Geneva and Brussels.

law. To use the words of Lord Beaconsfield: "I really cannot explain the difference between a congress and a conference, because I do not recognize any distinction between them." There is a common idea that a congress consists of sovereigns, and a conference of plenipotentiaries; but there is no foundation for the distinction. The Congress of Rastadt, at the beginning of the last century, was composed of plenipotentiaries, and so was the Congress of Paris, 1856. Certain of the congresses, notably that of Vienna, were made up of both sovereigns and plenipotentiaries. Within the last half century the presence of sovereigns at either conferences or congresses has become very unusual. Nor, indeed, is this change hard to account for, since it is out of the question for republics, and in limited monarchies the treaty-making power of the sovereign is not unlimited but is controlled by the legislative branch.

Conference at  
the Hague.

The last, and in many respects the most important conference of them all was the Conference at the Hague, 1899. It has already borne sufficient fruit to make it clear that it is an epoch-making event in international law. Out of its labors was born the new system of international arbitration. It is a fertile source of international law from the standpoint of achievements, but more so from the standpoint of the inspiration which it has furnished toward settling disputes in a rational way, though this latter is by no means so easy of measurement.

Other con-  
gresses and con-  
ferences.

We have omitted any detailed mention of the Congresses of Nimeguen, 1678; Ryswick, 1697; Verona, 1822; Berlin, 1878; and the conferences of St. Petersburg, 1825 and 1868; London, 1831 and 1871; Constantinople, 1877; Berlin, 1884 and 1885; Washington, 1889; Brussels, 1890; Portsmouth, 1905. This omission has been due partly to economy of space and partly to the fact that the most of these were of diplomatic and political rather than legal significance.



## CHAPTER IV.

### PUBLICISTS.

It is conceivable that a writer might be given full power by the nations to create a code of international law covering one or all subjects. But as a matter of fact no writer has ever had any such power. While Field was authorized to draft an international code, his authority came not from a majority of the nations, and not even from one nation, but from an association of private individuals to which he belonged. His code had the same authority as that of any other publicist, viz., the accuracy with which he stated established rules, the reasonableness of the changes which he proposed and the convincing logic with which he buttressed his proposals.

The position of  
the publicist.

But we must not conclude that because the publicist has not the official power to force the acceptance of the provisions which in his judgment ought to be a part of international law that for this reason his works have no weight and hence ought not to be considered among the sources of international law. The decision of a judge in a prize court is not international law for any country except his own. The difference between his decision and the decision of a publicist is therefore a difference of degree more than of kind. For in all other prize courts save the one in which the decision was rendered it has weight or has not weight according as it seems reasonable or unreasonable, just or unjust, — in other words, for the same reasons for which the opinion of a publicist has weight. As a matter of fact we know that judges the world over have and in all probability will continue to cite the works of publicists of standing for the purpose of determining what the international law upon a certain question is.

Difference  
between opin-  
ions of publicist  
and of prize  
judge.

The publicist in  
the develop-  
ment of com-  
mon law.

Nor is this peculiar to the realm of international law. In common law courts, such writers as Blackstone, Greenleaf, Story, Pollock, are not infrequently cited for the purpose of determining what the law is. No doubt this is becoming less frequent with the process of codification, the increase of statutory regulation and the greater emphasis placed upon cases; but the practice is by no means obsolete. That the establishment of an international court will tend to decrease the importance of the publicist as a source of international law there is little room for doubt, as in course of time its decisions will have covered most questions and will, by increasing this authoritative source, make it less necessary to resort to others. In other words, the same evolution will take place here as has taken place in the field of common law. Yet, so far as can be seen now, when a really great publicist, a man who can discern tendencies and grasp principles, who sees clearly the needs of states and writes with convincing logic what he sees — in short, a man like Grotius, whose book produced a decided effect upon the history of the world, can never become an inane source of international law. In 175 U. S. 677 the Supreme Court of the United States quoted with approval the following concerning text-writers: "They are generally impartial in their judgment, and the weight of their testimony increases every time that their authority is invoked by statesmen. Their writings are regarded as of great consideration on questions not settled by conventional law. No civilized nation, that does not arrogantly set all ordinary law and justice at defiance, will venture to disregard the uniform sense of the established writers on international law."

## CHAPTER V.

### MISCELLANEOUS SOURCES.

Of scarcely less importance than the foregoing sources are certain others which, though frequently slighted or overlooked entirely, are nevertheless fruitful sources of international law. These we will now consider:

In the course of their negotiations with each other, it becomes necessary for states to give instructions to their diplomatic representatives, in order that the acts of the latter may the more surely conform to the will of the state. In these instructions we find the most careful and able statements of what states consider to be their rights under international law. While such instructions would not necessarily bind the state in a subsequent transaction in which another state were to claim as against the state giving the instructions the rights contended for in them, it would be a very rare case indeed in which a state would refuse to be bound by a rule which it had officially sanctioned.

Of like weight and nature as a source of international law is the diplomatic correspondence between the representatives of different states. Though tinged to a certain extent with the bias of an advocate, and thus lacking in that disinterestedness and impartiality which should and usually does characterize the judgment of text-writers, we find nevertheless in such correspondence the statements of men whose life work has been the familiarizing of themselves with the rights and duties of nations.

The value of this class of material as a source of international law may be well illustrated by reference to the diplomatic correspondence of the United States. Our early correspondence with England on the question of the

Diplomatic instructions.

Diplomatic correspondence.

Illustrations from American diplomacy.

impressment of American seamen is one of the ablest discussions of the alleged right of one country to interfere with the citizens of another. No less able is our contention, during the secretaryship of Jefferson, in behalf of the rights of neutrals. The correspondence of Mr. Charles Francis Adams with Lord Russell relative to the duties of a neutral state to see that its neutrality is not disregarded either by the belligerents or by its own citizens is the most exhaustive discussion of the question to be found anywhere. The practical effect of this discussion cannot have escaped anyone who has studied the question of the rights and duties of neutrals at all thoroughly. The United States has been particularly fortunate in the possession of an exceptionally able and broad-minded line of men who have occupied the position of head of our department of State and of the more important foreign embassies. Men of the type of Franklin, Jefferson, Clay, Webster, Calhoun, Seward, Evarts, Blaine, Bayard, Choate, and Hay have given to American diplomacy a character and won for it a respect that gives to it a high value in determining what the rules of international law upon a given question are, as well as making it an important factor in influencing the development of international law.

The opinions of Attorneys General of the United States and corresponding officers of the departments of justice of other states must not be overlooked in an enumeration of the sources of international law. As the opinion of these officers of the department of justice may be sought by the political branch of the government upon questions of international law arising out of pending transactions, it is but reasonable to suppose that such opinions, when rendered, will be given considerable weight in determining governmental action. If the government acts in accordance with them, and it usually does, they become the official expression of the state's views upon that question of international law, and as

**Opinions of Attorneys General.**

such form a precedent for the future acts of that state. When their reasonableness commends them, their influence is by no means confined to their own state.

Proclamations by the head of the state and ordinances for regulating the acts of its war vessels and for the guidance of its prize tribunals form an important source of international law. Among the former are proclamations issued by the heads of the belligerent states at the commencement of war, setting forth the causes leading to war and defining its position with reference to contraband, etc. **Proclamations and ordinances.** Though these are not necessarily binding for other wars than the one at the beginning of which they are issued, they do nevertheless form precedents which there is a strong tendency upon the part of the state to follow in future wars. They are frequently appealed to by other states to justify their conduct under like circumstances. Among the latter are marine ordinances. These are not intended as an expression of the municipal law of the country publishing them. They are intended rather as a codification of its rights and duties under the law of nations, with reference to the matters covered by such ordinances.

Among the best examples of such ordinances is the celebrated ordinance of Louis XIV. Concerning this, Sir William Grant says; "When Louis XIV published his famous ordinance of 1681, nobody thought that he was undertaking to legislate for Europe, merely because he collected together and reduced into the shape of an ordinance the principles of marine law as then understood and received in France. I say in France, for although the law of nations ought to be the same in every country, yet as the tribunals which administer the law are wholly independent of each other, it is impossible that some differences shall not take place in the manner of interpretation and administering it in the different countries which acknowledge its authority. Whatever may have been since **Ordinance of Louis XIV.**

attempted, it was not, at the period now referred to, supposed that one state could make or alter the law of nations, but it was judged convenient to establish certain principles of decision, partly for the purpose of giving a uniform rule to their own courts, and partly for the purpose of apprising neutrals what that rule was. The French courts have well and properly understood the effect of the ordinances of Louis XIV. They have not taken them as positive rules binding upon neutrals; but they refer to them as establishing legitimate presumptions, from which they are warranted to draw the conclusion, which it is necessary for them to arrive at, before they are entitled to pronounce a condemnation." (Marshall on Insurance, Vol. I., p. 425.)

**Lieber's Code.** Of like character and effect as the above ordinance, only that it was intended to regulate matters on land instead of on sea, was Lieber's Code issued by the War Department for the regulation of its armies in the field. Though not purporting to have any application except to our own military forces, their humaneness has so far commended them to other nations that these rules have profoundly affected the laws of war.

**History.** The acts of states in their international relations are recorded by the historian; as is frequently also the manner of their action and why they acted in one way rather than another. Though there may have been no treaty or legal decision obligating them so to act, the fact that they did act in a certain way established to a certain extent a precedent for future acts. Such acts, if of importance, are appealed to by other states when their ethics or their interests impel them to do so. In this way, what may at first have seemed accidental are preserved as a memorial and gradually developed into a rule of international law. The record of the historian is therefore a latent source of the law of nations.

With reference to the relative value of the different

sources of international law, Dana says in his edition of Wheaton, note 11: " Commentators seem agreed as to what are the sources of international law. They differ as to the relative importance and authority of these sources. Relative value of different sources. Hautefeuille, especially, gives little weight to the decisions of prize courts, and places far before them the speculations of writers. It is noticeable that continental writers incline the same way, although they may not go as far; while Wheaton, Kent, Story, Halleck, and Woolsey in America, and Phillimore, Manning, Wildman, Twiss, and others in England, give a higher place to judicial decisions. This is attributable to the different systems of municipal law under which they are educated. In England and America, judicial decisions are authoritative declarations of the common law, i. e., the law not enacted by decrees of legislators, but drawn from the usages and practices of the people, and from reason and policy. They are, at the same time, the highest evidence of what the law is. Under those systems, writers are brought to the test of judicial decisions; and even those portions of the opinions of the court itself, not necessary to the decision of the cause before it, are termed *obiter dicta*, and are not authority, but stand on no higher ground than voluntary speculations of learned men as to what the law might prove to be in a supposed case. The continental writers, on the other hand, — living under municipal systems in which judicial decisions hold no such place, and are neither precedents, authoritative declarations, nor authentic evidence of the law, — are led by their education to look but to one authoritative source of law, the decrees of legislators; and, in the absence of these, naturally put the scientific treatises of learned men, systematic, and enriched with illustrations, above the special decisions of tribunals on single cases, which by their systems, do no more than settle the particular controversy, without settling the principles evoked by its

decision. With the English and the American lawyer or scholar, it is the habit of life to consider a decision by a judicial tribunal, on an actual case, as ordinarily the best attainable evidence of what the law applicable to that case is. The fact that parties have been engaged in actual conflict, in which property, character, or life, have been staked upon the law of that case, and learned counsel employed, creates a probability that the law has been thoroughly examined, and shown in the various lights in which open contestation tends to place it. It is thought, too, that the law evoked by actual cases, after they have arisen and been presented, with all their consequences, is more likely to be practical, than the mere abstract speculations of the wisest. The court, too, in ascertaining the law and applying it, besides having the aids referred to, is acting under the sanctions of public official duty on a matter known to involve interests, which the law it shall declare will settle finally; and with the further caution of knowing that the principle or rule it adopts is to become a general precedent for the law of other cases, and to be subjected afterwards to the test of time, not only by critical examinations of text-writers, but in respect of its applicability to the actual transactions of life, brought before the same or other courts, under other circumstances and in other times."



# PART III.

## PEACE, OR THE NORMAL RELATION OF STATES.

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### CHAPTER I.

#### THE BIRTH OF A STATE.

While in the constitutional sense a state exists as soon as we have a politically organized community not recognizing outside control; in the international sense, recognition by other states is necessary. In international law, therefore, the recognition by other states that a state is entitled to all the rights and privileges of independence, must be accorded before such rights and privileges can be claimed as a matter of law. When recognition should be granted is a matter which legally rests with the judgment of the states already belonging to the family of nations. Undoubtedly there is a moral obligation to grant it as soon as the other conditions essential to statehood are present. But as to the existence of the conditions the state demanding recognition is not the sole judge; the final judgment must rest with the state or states according to recognition.

Recognition may take any one of several forms. It may be by a specific declaration of the state according to recognition. The reception of a minister from the country seeking recognition or sending a minister to such country, constitutes a recognition of it. Some have claimed that the granting of an exequatur to a consul of the country seeking recognition is sufficient evidence of an

Recognition  
necessary to  
state-hood in  
international  
sense.

Form of  
recognition.

intention to recognize. This is, however, somewhat doubtful. The making of a treaty with a country seeking recognition is undoubtedly a sufficient recognition of it, for treaties exist only between independent states. The independence of a state may also be recognized by protocol. It is under this form that the independence of Greece was recognized in 1827, as was also that of the Empire of Germany in 1871. The parties to the first of these protocols were: Great Britain, France and Russia; and to the second: Great Britain, France, Austria, Germany, Russia and Turkey.

**Recognition of  
belligerency.**

A recognition of independence must be distinguished from a recognition of belligerency. The latter means simply that there is a *de facto* state, which may or may not become independent. This is temporary, while the recognition of independence is permanent. A recognition of belligerency is frequently for the purpose of safeguarding the commercial interests of the recognizing state, during the continuance of the war. A recognition of belligerency requires therefore a less conclusive degree of evidence upon which to rest than does a recognition of independence.

**Recognition of  
*de facto* state.**

Though the recognition of a *de facto* government may be the expression of a wish, it is in law the recognition of a fact. This fact is the existence of a politically-organized community, having an established seat of government, enforcing obedience to its mandates within its territorial limits in a civilized and orderly manner, and asserting its independence, with a reasonable chance of being able to make good its assertion. This does not mean that in case it has hitherto formed a part of another state, all resistance upon the part of the parent state shall have ceased, but that it is reasonably sure that the revolted section will be able to successfully resist such restraining force as said parent state can and will exert in maintaining over them its alleged sovereignty. In other words, the community

seeking recognition as a *de facto* government should have something more than an even chance to live, although the permanency of its existence need not be established beyond all peradventure.

When such a condition of affairs exists, the claimant nas, under international law, a right to recognition and other states are not justified in refusing it recognition. But as to the existence of the facts each state must be its own judge, and provided it acts in good faith, neither recognition nor the withholding of it is any just cause of complaint, however much its judgment may differ from that of other states. If, however, a state acts in bad faith and extends recognition for the purpose of encouraging resistance to the parent state, such recognition ceases to be the rightful act of a neutral and becomes interference which might justly be considered as a *casus belli*.

As to the recognition of independence, perhaps the best statement of the rule is that of John Quincy Adams, Rule as laid down by Adams. quoted with approval by Wharton in his Digest of International Law, and by Sir William Hall in his treatise on International Law:—

“There is a stage in revolutionary contests when the party struggling for independence has, I conceive, a right to demand its acknowledgment by neutral parties, and when the acknowledgment may be granted without departure from the obligations of neutrality. It is the stage when independence is established as a matter of fact, so as to leave the chance of the opposite party to recover their dominion utterly desperate. The neutral nation, must, of course, judge for itself when the period has arrived; and as the belligerent nation has the same right to judge for itself, it is very likely to judge differently from the neutral, and to make it a cause or pretext for war, as Great Britain did expressly against France in our revolution, and substantially against Holland. If war results in point of fact from the

measure of recognizing a contested independence, the moral right or wrong of the war depends upon the justice and sincerity and prudence with which the recognizing nation took the step."

**Recognition by parent state and by other states.** Certain writers have attempted to make a distinction between the recognition of independence by the parent state and by other states. For instance, Sir James McIntosh says: "The two senses in which the word recognition is used when applied to the act of the mother-country, and when applied to that of third powers, are so different as to have nothing very important in common." Canning indorses this view. But the distinction will not hold, for both are simply evidence as to the existence of a fact, and, while one may be more conclusive than the other, the difference is clearly one of degree rather than one of kind.

In case a state springs up in unoccupied, unclaimed territory, there is not likely to be much friction caused by a recognition of its independence, as there is in the case of a state formed by separation. Of the former the Congo Free State furnishes a unique illustration.

**Case of Congo Free State.** From 1879 to 1884 the territory of this state was ruled over by the International Association of the Congo. This was a private association whose president was King Leopold, acting not as King of Belgium but as a private individual. Within its territory this association performed the usual acts of sovereignty and by securing obedience became a de facto state. Its independence was recognized by the United States in April of 1884, and later in the same year by Great Britain and Germany.

After recognition of independence has been accorded by one state, though there is no obligation upon the part of others to accord recognition, it is usually done and without much delay, particularly if the state which first accords recognition is a powerful one.

The recognition of the South American Republics occa-

sioned considerable discussion and not a little difference of opinion. When in 1818, Henry Clay offered a resolution in Congress favoring their recognition, Argentina was in undisturbed possession of sovereignty and had been since its declaration of independence two years earlier, Chile was also in full and undisturbed possession of sovereignty; yet the resolution to recognize their independence was defeated by a large majority. The view seems to have been that their independence was not sufficiently assured while Spain held any strongholds upon the continent which might be used as bases of operation against them. Four years later Monroe, in his message to Congress, called its attention to the fact that "the contest had reached such a stage, and had been attended by such decisive success upon the part of the provinces, that it merits the most profound consideration whether their right to the rank of independent states is not complete." This time Congress acted favorably to recognition. In the report of the Senate Committee on Foreign Affairs is to be found the significant statement that "the political right of the United States to acknowledge the independence of the South American Republics, without offending others, does not depend upon the justice but on the actual establishment" of their independence.

**The South  
American  
Republics.**

"It was only in 1824, when it could be asked 'What is Spanish strength?' and the answer was, 'A single castle in Mexico, an island on the coast of Chile, and a small army in Upper Peru' that the question of recognition was considered ripe to be seriously taken in hand by England. The British Government may have been unduly slow to be convinced that the South American Republics had in fact definitely achieved their independence." (Hall's International Law, p. 91.) During the debate upon the question Lord Liverpool said that he "had no difficulty in declaring what had been his conviction during

**a Their recogni-  
tion by Great  
Britain.**

the years that the struggle had been going on between Spain and the South American provinces—that there was no right while the contest was actually going on to recognize the independence of the provinces. The question ought to be—was the contest going on? He, for one, could not reconcile it to his mind to take any such step so long as the struggle in arms continued undecided. And while he made that declaration he meant that it should be a bona fide contest.” (Hansard’s Debates, Vol. X., p. 974 *et seq.*)

Recog. of Bel.  
of Confed. by  
Great Britain  
and France.

The recognition of the belligerency of the Confederacy, by England and France, aroused a great deal of feeling in this country, but from the legal standpoint their recognition was justifiable. In fact, the United States had virtually recognized the belligerency of the Confederacy by the proclamation of a blockade of the Confederate ports; and this proclamation preceded the recognition of belligerency by England and France. What occasioned the bitterness in the United States was the conviction that the recognition was prompted by unfriendly motives. But law has nothing to do with motives. It is due to England to say that when the question of recognizing the independence of the Confederacy presented itself the British Government was guided by the same rules which were followed in the case of the South American Republics. (See letter of Lord Russell to Mr. Mason, the agent in London of the Confederacy, of August 2, 1862.)

Case of  
Panama.

The recent act of the United States in recognizing the independence of the Republic of Panama, within a few days after the Republic had declared its independence, has been severely criticised both at home and abroad. The bulk of the criticism has been with reference to the promptness with which the United States accorded recognition; yet the length of time during which the revolution has been going on is manifestly a matter of

indifference, so long as the necessary results have been accomplished. And in this case it would seem that the withdrawal of the government forces from the Isthmus, leaving the revolutionists in complete control, was a virtual recognition of their sovereignty by the Colombian government itself, which, coupled with the fact that there was no apparent likelihood that said decadent government would ever be able to re-establish its sovereignty over its revolted subjects, furnished ample justification for the recognition by the United States of the existence of a *de facto* and also of a *de jure* government.

But it is urged by certain of the critics that the United States, for selfish purposes, fomented the revolution upon the Isthmus. The accusation rests entirely upon supposition. If the revolution could be accounted for upon no other ground than the theory of guilty co-operation upon the part of the United States, the above supposition would have a logical basis upon which to rest. But no such supposition is necessary in order to explain the facts. There was ample incentive to revolt, apart from any outside interference. The people of the Isthmus had never derived any very substantial benefit from their political connection with Colombia. Only about one-tenth of the revenues collected from them were spent for their benefit; and what protection they received, they received from the United States. To be thus used as a political asset for the benefit of a knot of corrupt politicians at Bogota was certainly not well calculated to strengthen their feeling of allegiance.

Viewed in the light of Colombia's past indifference toward the welfare of the Isthmian provinces it seems entirely natural that when their interests were selfishly sacrificed and their reasonable hopes blighted by the political narrowness which rejected the Hay-Herran treaty, the people of the Isthmus should have done exactly what they did, viz., dissolve the political bond which kept them

from rendering the service and reaping the benefit which God and nature intended they should. It is an injustice not to concede to those people, situated upon the world's highway of commerce, some degree of intelligence and some degree of self-interest. Not to have manifested a determination that their great natural resource, due to their situation, be used to their own and the benefit of mankind rather than senselessly wasted, would have been unmistakable evidence of an imperative need for the appointment of a commission of lunacy.



## CHAPTER II.

### NATIONAL CHARACTER AND DOMICILE.

Though the political status or national character of an individual is primarily a question of constitutional law, so many questions of international law depend upon it that it is necessary for us to consider it. These questions may be grouped under the heads of (1) citizenship, (2) domicile.

To what extent  
a question of  
Int. law.

In international law the term citizen is used synonymously with subject. All are citizens of a state who owe to that state the duty of allegiance and support and who in turn are entitled to its protection for their persons and property. Ordinarily we make a distinction by applying the term citizen to the members of a republic and subjects to the members of a monarchy, outside the rulers. Nationals would perhaps be a better term than either, as it would be more inclusive. As, for instance, there was a time when the Porto Ricans were not considered as citizens, neither were they subjects; but as they owed allegiance to the United States and it owed protection to them they were certainly nationals. Yet as we are so used to the term citizen it would be hard to change and if we understand it to include all that would be included by the term national, all is well.

Citizen and  
subject synony-  
mous terms.

Citizenship may be acquired by birth or by naturalization. Of those who are citizens by birth, there can be no question as to the citizenship of those born in a country of which their parents are citizens, provided neither they nor the state have done anything to terminate their citizenship; or of foundlings, for the citizenship of their parents being unknown, they can have no other citizenship than that of the state upon whose territory they have been discovered.

Citizenship, how  
acquired.

When we go further than this we are confronted with conflicting theories and usages.

Place of birth  
as fixing citizen-  
ship.

Descent.

Provision of  
Code Napoleon.

According to the feudal idea the place of birth fixed one's citizenship regardless of that of his parents. This rule prevailed for a long time after the feudal system had passed away and may be said to have been the rule in Europe up to the establishment of the Code Napoleon. By that code the principle of descent was substituted for place of birth. According to Hall, this principle found its way into the code almost by accident. "By the draft code it was proposed to be enacted, and the proposal was temporarily adopted, that '*tout individu né en France est Français*'" It was urged against the article that a child might, *e. g.*, be born during the passage of its parents through France, and would follow them out of it. What would attach him to France? Not feudality, for it did not exist on the territory of the Republic; nor intention, because the child could have none; nor the fact of residence, because he would not remain. These reasonings seem to have prevailed. In any case the article was changed." So many of the states of Europe have modeled their municipal laws after the code that now, Austria-Hungary, Germany, Norway, Sweden, Belgium, Denmark, Greece, Rumania, Servia, and Switzerland follow the law of descent in determining national character.

Election of  
citizenship.

Russia and Spain, while following in the main the principle of descent, allow to one born and residing upon their territory the right upon reaching his majority to elect for himself what national character he will take. England and Portugal follow the old rule of place, with the above right of election. But England is inconsistent in that she claims as British subjects all who are born within her dominions and also the "children and grandchildren of British subjects born outside the ligeance of his Majesty, unless the father was at the time of the child's birth out-

lawed or attainted for treason." (Wheaton, p. 243, 4th Ed.) There is evidently in this rule an intent to make British subjects of as many persons as possible.

In the United States the place of birth plus the fact of jurisdiction determines national character. The most of the South American states adhere to the principle of place of birth.

A married woman, as a rule, takes the nationality of her husband. But in the United States we find the somewhat inconsistent rule that if an American woman marries a foreigner it does not necessarily change her nationality, but if a woman who is a foreigner marries an American she thereby becomes an American citizen. In most countries, the marriage in order to affect nationality must be valid; but in France it changes the nationality of the woman even though the marriage be a nullity.

Children, if legitimate, take the nationality of their father; if illegitimate, that of their mother. A curious exception to this is to be found in the case of England. By English law illegitimate children born to English women while abroad are not considered English, as would be the case with legitimate children, because it is by statute only that children born beyond the kingdom are admitted to the privilege of being English subjects, and no statute exists which applies to children produced out of wedlock. (Hall, p. 238.)

It is a general rule in all countries that children born abroad to ambassadors, ministers, consuls, in short to persons having extraterritorial privileges, do not take the national character of the place of their birth, but that of their parents. Children born upon the high seas take, as a rule, the national character of their parents, though in some cases they are allowed, upon reaching their majority, to elect what national character they will take. Where the theory prevails that even a private vessel is a part of the

Citizenship of married women.

Citizenship of children.

Children born abroad to those entitled to extraterritorial rights.

Children born on high seas

soil of the country whose flag it flies, the nationality of the ship would determine the nationality of the child born on it, for those countries following the rule of place of birth.

Having examined how citizenship may be acquired by birth and by descent, we now proceed to inquire how it may be acquired by naturalization.

**Naturalization.**

Naturalization is the process by which one acquires a new citizenship. Thus far there can be no question; whether or not it affects his former political status has been the subject of much dispute. It is entirely competent for each State to determine by its municipal law who may be naturalized and also the form, or manner, of naturalization. In the United States this matter rests entirely with Congress. So long as the law is uniform there is no question as to the competence of Congress to pass it. Whether the exclusion of certain classes or rather the failure to provide for their naturalization is wise or unwise is wholly a question of policy, not of law. And certainly not one of international law. The point at which naturalization touches international law is where a state on the ground of the new relation between it and the individual, established, by virtue of naturalization, asserts rights or claims protection over such individual which conflict, or seem to conflict, with the rights of other States. As this has occasioned no end of dispute, and at least one war, it is worth while to examine at some length the practice with reference to it.

**Naturalization  
in the United  
States.**

In the United States the political branch of the government has repeatedly asserted that a person might lawfully be naturalized and thereby change his national character, notwithstanding the government of which he was formerly a citizen or subject might restrict or forbid his renunciation of allegiance.

**Right of Ex-  
patriation.**

In other words it has contended that expatriation is a "natural right." The courts, however, have not concurred

in this opinion. They have almost uniformly adhered to the opinion that the right of the state to require a continuance was greater than the right of the individual to sever his allegiance. The view of the political branch of the government was in the ascendant during the earlier period of our national life. Nor can it be said that it lacked a solid basis upon which to rest. For, as the relation between the individual and the state, whether contractual or otherwise, could be terminated at the will of the state, *i. e.*, it might exile or banish him, it would seem equitable that the individual should also be allowed to terminate the relation. The doctrine of the right of expatriation has perhaps been most forcibly put by Mr. Cass. As Secretary of State he wrote in his instructions to our minister at Berlin, relative to a dispute between the United States and Prussia, in 1859, that "the moment a foreigner becomes naturalized his allegiance to his native country is severed forever. He experiences a new political birth. A broad and impassible line separates him from his native country. Should he return to it, he returns as an American citizen, and in no other character." A majority of both Houses of Congress declared in 1868 that "the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of life, liberty, and the pursuit of happiness," and enacted further that "all naturalized citizens of the United States while in foreign states shall be entitled to and shall receive from their government the same protection of persons and property that is accorded to native-born citizens, in like situations and circumstances." Fifteen years before that, we had refused to interfere in order to protect against military service a Prussian who had been naturalized in this country and had afterwards gone back to Prussia.

Cass's view of  
the right of  
expatriation.

Declaration of  
Congress.

The United States has had no small amount of difficulty with reference to the protection of persons partly natural-

Practice of  
United States.

ized, *i. e.*, those who have declared their intention to become American citizens and taken out their first papers. The most famous case of this sort is that of Martin Koszta. Koszta had taken part in the Hungarian revolution of 1848-9. He escaped to Turkey where he was put in prison, but was released on condition that he would leave the country. He came to the United States and declared his intention of becoming a citizen. In 1853 (before the expiration of the five years necessary to full naturalization) he went to Smyrna where he obtained from the United States Consul a traveling pass stating that he was entitled to American protection. While at Smyrna he was seized by some Turks who were very probably in the pay of Austria. Not wishing to come into collision with the United States by delivering into the hands of his enemies one whose passports recited that he was entitled to American protection, they hit upon a scheme which was characteristic of Turkish diplomacy — they took him out in a boat which accidentally capsized where he could easily be picked up by The Hussar, an Austrian warship. The American consul protested, but no heed was paid to the protest. The protest and demand for Koszta's release was repeated by the commander of the St. Louis, an American man-of-war, which chanced to be in the harbor. As the request was not complied with the American commander cleared his decks for action, whereupon Koszta was released. This would seem to be an example of "shirt-sleeves diplomacy." No doubt the act of the American commander was a trifle high-handed, particularly as he was in the territorial waters of a friendly state; yet it may be considered one of those rare cases in which the end justified questionable means. As the sympathy of the American people was strongly with Koszta, they enthusiastically approved the act, and the commander was not disciplined.

Tousig's case differs from that of Koszta in that the

former voluntarily returned to Austria, whose laws he had violated before coming to the United States, and under these circumstances the United States refused to interfere in his behalf, on the ground that "having once been subject to the municipal laws of Austria, and while under her jurisdiction violated those laws, his withdrawal from that jurisdiction and acquiring a different national character would not exempt him from their operation whenever he again chose to place himself under them."

*Toussig's Case.*

We now have treaties with most of the leading states of Europe regulating this matter of partial naturalization. The treaty with Germany is typical and according to it if a German who has been partly naturalized goes back to Germany and remains there two years such residence will be taken as proof of his intention to remain permanently and his relation with the United States is at an end.

*Treaties concerning naturalized subjects.*

Turning from political to civil status we find that the latter is determined entirely by domicile, no matter what may have been one's birth-place. Lord Westbury thus distinguishes it from political status: "The law of England, and of almost all civilized countries, ascribes to each individual at his birth two distinct legal states or conditions; one, by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance, and which may be called his political status; another, by virtue of which he has ascribed to him the character of citizen of some particular country, and as such is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil status or condition of the individual, and may be quite different from his political status. The political status may depend on different laws in different countries; whereas the civil status is governed universally by one single principle, namely, that of domicile, which is the criterion established by law for the purpose of determining civil status. For it is on this basis that the

*Civil status determined by domicile.*

personal rights of the party, that is to say, the law which determines a majority or minority, his marriage succession, testacy or intestacy depend." From this it is clear that a person may have the national character of one state and at the same time have his domicile in another.

**Residence.**

Domicile is also distinct from residence. While residence is a matter of fact, domicile is a conception of law. It is a relation which the law creates between the individual and the state in which he is staying. It is residence plus "positive or presumptive proof of an intention to remain there for an unlimited time" (*Mitchell v. United States*, 21 Wallace, 352). The essentials of domicile are, then, two: (1) "the fact that an abode which can in some shape or other be considered a home exists in the country," and (2) "The intention that the abode shall not cease to be the home within any definite period." In discussing the question of domicile Justice Washington said in the case of *The Venus*, 8 Cranch, 280: "In questions upon this subject, the chief point to be considered is the *animus manendi*; and courts are to devise such reasonable rules of evidence as may establish the fact of intention. If it sufficiently appears that intention of removing was to make a permanent settlement or for an indefinite time, the right of domicile is acquired by a residence even of a few days. This is one of the rules of the British courts, and seems to be entirely reasonable. Another is that a neutral or subject residing in a foreign country is presumed to be there *animo manendi*, and if a state of war should bring his national character into question, it lies upon him to explain the circumstances of his residence." In support of these conclusions he cites the case of *The Bernon*, 1 Rob. 86. Though a man's home, if he is married, is usually where his wife and children live, the domicile of the wife is that of the husband and of the minor children that of their father. If the husband and wife are living apart, though

**Essentials of domicile.**



not divorced, the domicile of the wife is still that of her husband.

One's domicile may be either that of origin or choice. As soon as a child is born he acquires or is invested with a domicile, this is his domicile of origin, which in the case of legitimate children is that of the father and of illegitimate children that of the mother. A domicile acquired as a result of voluntary action, whether by change of residence or marriage is a domicile of choice. While the domicile of choice continues the domicile of origin is in abeyance, but attaches as soon as the former is lost, so that one is never without a domicile. The revivification of one's domicile of origin is a matter of law, not of intention. For in theory of law it cannot be brought to an end by the individual, though the state may by sentence of death or exile put an end to it so that one may in this way be deprived of his civil status, *i. e.*, may become civilly dead.

As domicile of choice, except when brought about by operation of law, rests upon residence which is a question of fact, it also is largely a question of fact, although the consequences of it, when once it is ascertained, are questions of law. When one claims a domicile in a place where he does not reside he must submit evidence in support of his allegation; in other words, the burden of proof rests upon him, for there is a presumption of continuance of his domicile acquired by residence.

As to the consequences of residence Sir William Scott says: "It is an adventitious character gained by residence. It no longer adheres to the party from the moment he puts himself in motion, bona fide, to quit the country *sine animo revertendi*" (3 Rob. 17). Thus it does not leave behind it a trail as does domicile. While the latter impresses upon the goods of one the character of the country in which he is domiciled to such an extent that it cannot be immediately shaken off, mere residence does not

produce these lasting effects. This distinction is put by Grotius in the following language: "All subjects of the enemy who are such from a permanent cause, that is to say, settled in the country, are liable to the law of reprisals, whether they be natives or foreigners; but not so if they are only trading or sojourning for a little time." (De Belli ac Pacis, p. 563.)

**Status of  
Indians.**

The status of the American Indians has occasioned no small amount of trouble to the government of the United States. During our early history they were treated as foreign nations and treaties were made with them from time to time. They were allowed jurisdiction over civil and criminal matters within the tribe, so that their tribes formed to a certain extent an *imperium in imperio*. But since 1871 no treaties have been made with them and since 1885 they have been held amenable to the jurisdiction of the Federal courts. The jurisdiction of the Federal courts over crimes committed by Indians while still belonging to the tribal organization will be found fully discussed in the case of *United States v. Kagama* at the close of this chapter. Indians who have broken away from the tribal organization and are pursuing the ordinary pursuits within our borders have the same status as other citizens of the United States. It is no doubt unfortunate that our present view as to the status of the Indians was not reached in the earlier history of our relations with them. It would most certainly have been more logical and at the same time conducive to better results than the plan of treating them as foreign dependent nations within our borders.

## WAGNER'S CASE.

(2 Wharton's Digest, 392, Snow's Cases, 225.)

IMMUNITY OF NATURALIZED SUBJECT FROM SERVICE IN  
THE ARMY OF HIS NATIVE COUNTRY.

“ From the responses previously made to your inquiries in Mr. Wagner's behalf, it appears that the brunt of the charge against him was that he, a minor, quitted Russian jurisdiction in advance of attaining the age when he might have been called upon for military service. He was born at Lodz, 1852, and in 1874 became liable to military service. He came to the United States in 1869, five years before the liability could rest upon him. When the technical offense, styled evasion of military duty, which is the sole charge against him, began to exist as a tangible accusation, Reinhardt Wagner had already, by residence in the United States for more than three years preceding his majority, acquired under our statutes the preliminary rights of citizenship. No nation should assert an absolute claim over one of its subjects under circumstances like these, and it is thought improbable that Russia will persist in such a claim, even if made. There would be no limit to such a pretension, for the taking of a male infant out of Russia might be regarded with equal propriety as an ‘ evasion ’ of eventual military service.

“ It is tantamount to asserting a right to punish any male Russian who, having quitted Russian territory and become a citizen of another state, may afterward return to Russia.

“ This claim is different from that put forth by some governments for the completion of military duty fully accruing while the subject is within their jurisdiction, and actually left unfilled. It is, for example, claimed that a subject who leaves the country when called upon to serve

in the army, and becomes a citizen or subject of another state, may, if he returns to the former jurisdiction while yet of age for military duty, be compelled to serve out his term. This rule appears harsh to us, and yet it goes no further, as a matter of fact, than a contention that an obligation of service accruing and unpaid while the subject is a resident of the country, continues, and is to be extinguished in kind by performance of the alleged defaulted service.

“But, harsh as it is, it is wholly different from the infliction of vindictive punishment, as, for instance, exile for the constructive evasion of an inchoate obligation. To exact the fulfillment of an existing obligation is one thing; to inflict corporal punishment for not recognizing a future contingent obligation is another.”

#### MACDONALD'S CASE.

(Cockburn's Nationality, p. 64.)

#### INDELIBLE ALLEGIANCE.

“In the case of Aeneas Macdonald, who was tried for high treason, for having borne arms in the rebellion of 1745, it appeared that the prisoner had been born in England, brought up from his early infancy in France, had in his riper years been employed in that country, and that he held a commission from the French King.

“After a faint attempt to make out that the prisoner had been born in France, his counsel, despairing of establishing that fact, addressed the jury on the great hardship of such a prosecution against a person so circumstanced, and speaking of the doctrine of natural allegiance, represented it as a slavish principle, derogating from the principles of the Revolution. But the court interposed, and said it never was doubted that a subject-born, taking a commission from a foreign prince and committing high treason, may be

punished as a subject for such treason, notwithstanding his foreign commission; that it was not in the power of any private person to shake off his allegiance and to transfer it to a foreign prince nor was it in the power of any foreign prince, by naturalizing or employing a subject of Great Britain, to dissolve the bond of allegiance between that subject and the crown. And the Lord Chief Justice Lee, in charging the jury, told them that, the overt acts laid in the indictment having been proved against the prisoner, and admitted by him, the only fact to be tried by them, was whether he was a subject of Great Britain; as in that case he must be found guilty.

“The prisoner was accordingly found guilty, but received a pardon on condition of banishment.”

#### MITCHELL v. UNITED STATES.

21 Wallace, 350.

#### CHANGE OF DOMICILE.

At the beginning of the late rebellion, Mitchell, the claimant and appellant, lived in Louisville, Kentucky. He was engaged in business there. In July, 1861, and after the 17th of that month, he procured from the proper military authority of the United States in Kentucky a pass permitting him to go through the army lines into the insurrectionary territory. He therefore went into the insurgent States and remained there until the latter part of the year 1864. He then returned to Louisville. When in the Confederate States he transacted business, collected debts, and purchased from different parties 724 bales of cotton. He took possession of the cotton and stored it in Savannah. Upon the capture of that place by General Sherman the cotton was seized by the military authorities. It was subsequently sold by the agents of the government. The proceeds amounting to the sum of \$128,692.22, were now in

the treasury. Mitchell bought the cotton in November and in December, 1864. He remained in the insurrectionary lines from July, 1861, until after the capture of Savannah by the arms of the United States.

Mr. Justice Swayne delivered the opinion of the court, as follows:

At the time when Mitchell passed within the rebel lines the war between the loyal and the disloyal States was flagrant. It speedily assumed the largest proportions. Important belligerent rights were conceded by the United States to the insurgents. Their soldiers when captured were treated as prisoners of war, and were exchanged and not held for treason. Their vessels when captured were dealt with by our prize courts. Their ports were blockaded and the blockades proclaimed to neutral nations. Property taken at sea, belonging to persons domiciled in the insurgent States, was uniformly held to be confiscable as enemy property. All these things were done as if the war had been a public one with a foreign nation. The laws of war were applied in like manner to intercourse on land between the inhabitants of the loyal and disloyal States. It was adjudged that all contracts of the inhabitants of the former with the inhabitants of the latter were illegal and void. It was held that they conferred no rights which could be recognized. Such is the law of nations, *flagrante bello*, as administered by courts of justice.

While such was the law as to dealings between the inhabitants of the respective territories, contracts between the inhabitants of the rebel states not in aid of the rebellion were as valid as those between themselves of the inhabitants of the loyal states. Hence this case turns upon the point whether the appellant was domiciled in the Confederate States when he bought the cotton in question.

When he took his departure for the South he lived and was in business at Louisville. He returned thither when

Savannah was captured and his cotton was seized. It is to the intervening tract of time we must look for the means of solving the question before us. There is nothing in the record which tends to show that when he left Louisville he did not intend to return, or that while in the South he had any purpose to remain, or that when he returned to Louisville he had any intent other than to live there as he had done before his departure. Domicile has been thus defined; "A residence at a particular place accompanied with positive or presumptive proof of an intention to remain there for an unlimited time." This definition is approved by Phillimore in his work on the subject. By the term domicile, in its ordinary acceptation, is meant the place where a person lives and has his house. The place where a person lives is taken to be his domicile until facts adduced establish the contrary.

The proof of the domicile of the claimant at Louisville is sufficient. There is no controversy between the parties on that proposition. We need not, therefore, further consider the subject.

A domicile once acquired is presumed to continue until it is shown to have been changed. Where a change of domicile is alleged the burden of proving it rests upon the person making the allegation. To constitute the new domicile two things are indispensable: First, residence in the locality; and, second, the intention to remain there. The change cannot be made except *facto et animo*. Both are alike necessary. Either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change. There must be the animus to change the prior domicile for another. Until the new one is acquired, the old one remains. These principles are axiomatic in the law upon the subject.

When the claimant left Louisville it would have been illegal to take up his abode in the territory whither he was

going. Such a purpose is not to be presumed. The presumption is the other way. To be established it must be proved. Among the circumstances usually relied upon to establish the *animus manendi* are: Declarations of the party; the exercise of political rights; the payment of personal taxes; a house of residence, and a place of business. All these *indicia* are wanting in the case of the claimant.

The rules of law applied to the affirmative facts, without the aid of the negative considerations to which we have adverted, are conclusive against him. His purchase of the cotton involved the same legal consequences as if it had been made by an agent whom he sent to make it.

#### HAUSDING'S CASE,

2 Wharton's Digest, 399.

NATIONALITY OF CHILDREN BORN IN THE UNITED STATES  
TO ALIEN PARENTS, BUT WHO HAVE NEVER DWELT IN  
THE UNITED STATES.

The "case of Ludwig Hausding, appears to have been decided according to the law and the facts. It is stated that having been born in the United States of a Saxon subject, he was removed to his father's native land, where he has ever since remained, although his father has subsequently become a citizen of the United States. You refused a passport on the ground that the applicant was born of Saxon subjects, temporarily in the United States, and was never 'dwelling in the United States,' either at the time of or since his parent's naturalization, and that he was not, therefore, naturalized by force of the statute, section 2172, Revised Statutes.

"It does not appear from your statement whether Wilhelm Hausding, the father, had declared his intention to become an American citizen before the birth of Ludwig. While this, if it were established, would lend an appear-



ance of hardship to an adverse decision upon his claim to be deemed a citizen, yet, even in this case, as the statutes stand, your decision would conform to the letter of the law, section 2168, which admits to citizenship, on taking the oath prescribed by law, the widow and children of an alien who has declared his intention but dies before completing his naturalization.

“By providing for special exemption it excludes the idea of any other exemption, as for instance in the case of the non-completion of the father's naturalization before the permanent removal of the minor son from the jurisdiction of the United States.

“Not being naturalized by force of the statute, Ludwig Hausding could only assert citizenship on the ground of birth in the United States; but this claim would, if presented, be untenable, for by section 1992, Revised Statutes, it is made a condition of citizenship by birth that the person be not subject to any foreign power.

“This last consideration serves only to answer the ‘quaere’ which you annex to your statement of the Hausding case.

“You ask: ‘Can one, born a foreign subject, but within the United States, make the option after his majority, and while still living abroad, to adopt the citizenship of his birthplace? It seems not, and that he must change his allegiance by emigration and legal process of naturalization.’ Sections 1992 and 1993 of the Revised Statutes clearly show the extent of existing legislation; that the fact of birth, under circumstances implying alien subjection, establishes of itself no right of citizenship; and that the citizenship of a person so born is to be acquired in some legitimate manner through the operation of statute. No statute contemplates the acquisition of the declared character of an American citizen by a person not at the time within the jurisdiction of the tribunal of record which confers that character.”

## RENUNCIATION OF ACQUIRED NATIONALITY.

(Snow's Cases, p. 224.)

“ A Prussian subject by birth emigrated to the United States in 1848, became naturalized in 1854, and shortly afterward returned to Germany with his family, in which was a son born in the United States, and became domiciled at Wiesbaden, where, together with his family, he has since continuously resided. The son having reached the age of twenty years, has been called upon by the German Government for military duty. The father invoked the intervention of the United States legation at Berlin, but declined in behalf of the son to give any assurance of intention on the part of the latter to return to the United States within a reasonable time and assume his duties as a citizen.

“ Article IV. of the naturalization treaty between the United States and North Germany of 1868, reads as follows: ‘ If a German naturalized in America renews his residence in North Germany without intent to return to America, he shall be held to have renounced his naturalization in the United States. \* \* \* The intent not to return may be held to exist when the person naturalized in the one country resides more than two years in the other country.’

“ It was held (1) that under the above article, the father must be deemed to have abandoned his American citizenship and to have resumed the German nationality; (2) that the son, being a minor, acquired under the laws of Germany the nationality of his father, but did not thereby lose his American nationality; (3) that upon attaining his majority, the son may, at his own election, return and take the nationality of his birth or remain in Germany and retain his acquired nationality; (4) yet that during his minority and while domiciled with his father in Germany, he cannot rightfully claim exemption from military duty there.”

UNITED STATES v. KAGAMA.

(118 U. S. 375.)

STATUS OF AMERICAN INDIANS.

Mr. Justice Miller delivered the opinion of the court.

The case is brought here by the certificate of division of opinion between the Circuit Judge and the District Judge holding the Circuit Court of the United States for the District of California.

The questions certified arise on a demurrer to an indictment against two Indians for murder committed on the Indian Reservation of Hoopa Valley, in the State of California, the person murdered being also an Indian of said reservation.

Though there are six questions certified as the subject of difference, the point of them all is well set out in the third and sixth, which are as follows:

“3d. Whether the provisions of said section 9 (of the Act of Congress of March 3, 1885), making it a crime for one Indian to commit murder upon another Indian, upon an Indian reservation situated wholly within the limits of a State of the Union, and making such Indian committing the crime of murder within and upon such Indian reservation ‘subject to the same laws’ and subject to be ‘tried in the same courts, and in the same manner, and subject to the same penalties as all other persons’ committing the crime of murder ‘within the exclusive jurisdiction of the United States,’ is a constitutional and valid law of the United States?”

“6. Whether the courts of the United States have jurisdiction or authority to try and punish an Indian belonging to an Indian tribe for committing the crime of murder upon another Indian belonging to the same Indian tribe, both sustaining the usual tribal relations, said crime having been committed upon an Indian reservation made and set

apart for the use of the Indian tribe to which said Indians both belong? ”

The indictment sets out in two counts that Kagama, alias Bactah Billy, an Indian, murdered Iyouse, alias Ike, another Indian, in Humboldt County, in the State of California, within the limits of the Hoopa Valley Reservation, and it charges Mahawha, alias Ben, also an Indian, with aiding and abetting in the murder.

The law referred to in the certificate is the last section of the Indian appropriation act of that year, and is as follows :

“ 9. That immediately upon and after the date of the passage of this act all Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with attempt to kill, arson, burglary and larceny, within any Territory of the United States, and either within or without the Indian reservation, shall be subject therefor to the laws of said Territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner, and shall be subject to the same penalties, as are all other persons charged with the commission of the said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above crimes against the person or property of another Indian or other person, within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States.”  
23 Stat. ch. 341; 9, 385.

The above enactment is clearly separable into two distinct definitions of the conditions under which Indians may be punished for the same crimes as defined by the

common law. The first of these is where the offense is committed within the limits of a territorial government, whether on or off an Indian reservation. In this class of cases an Indian charged with the crime shall be judged by the laws of the Territory on that subject, and tried by its courts. This proposition itself is new in the legislation of Congress, which has heretofore only undertaken to punish an Indian who sustains the usual relation to his tribe, and who commits the offense in the Indian country, or on an Indian reservation, in exceptional cases; as where the offense was against the person or property of a white man, or was some violation of the trade intercourse regulation imposed by Congress on the Indian tribes. It is new, because it now proposes to punish these offenses when they are committed by one Indian on the person or property of another.

The second is where the offense is committed by one Indian against the person or property of another, within the limits of a State of the Union, but on an Indian reservation. In this case, of which the State and its tribunals would have jurisdiction if the offense was committed by a white man outside an Indian reservation, the courts of the United States are to exercise jurisdiction as if the offense had been committed at some place within the exclusive jurisdiction of the United States. The first clause subjects all Indians guilty of these crimes committed within the limits of a Territory, to the laws of that Territory, and to its courts for trial. The second, which applies solely to offenses by Indians which are committed within the limits of a State and the limits of a reservation, subjects the offenders to the laws of the United States passed for the government of places under the exclusive jurisdiction of those laws, and to trial by the courts of the United States. This is a still further advance, as assert-

ing this jurisdiction over the Indians within the limits of the States of the Union.

Although the offense charged in this indictment was committed within a State and not within a Territory, the considerations which are necessary to a solution of the problem in regard to the one must in a large degree affect the other.

The Constitution of the United States is almost silent in regard to the relations of the government which was established by it to the numerous tribes of Indians within its borders.

In declaring the basis on which representation in the lower branch of the Congress and direct taxation should be apportioned, it was fixed that it should be according to numbers, excluding Indians not taxed, which, of course, excluded nearly all of that race, but which meant that if there was such within a State as were taxed to support the government, they should be counted for representation and in the computation for direct taxes levied by the United States. This expression, excluding Indians not taxed, is found in the XIVth amendment, where it deals with the same subject under the new conditions produced by the emancipation of the slaves. Neither of these shed much light on the power of Congress over the Indians in their existence as tribes, distinct from the ordinary citizens of a State or Territory.

The mention of Indians in the Constitution which has received most attention is that found in the clause which gives Congress "power to regulate commerce with foreign nations and among the several States, and with the Indian tribes."

This clause is relied on in the argument in the present case, the proposition being that the statute under consideration is a regulation of commerce with the Indian tribes. But we think it would be a very strained construction of

this clause, that a system of criminal laws for Indians living peaceably in their reservations, which left out the entire code of trade and intercourse laws justly enacted under that provision, and established punishments for the common law crimes of murder, manslaughter, arson, burglary, larceny, and the like, without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes. While we are not able to see, in either of these clauses of the Constitution and its amendments, any delegation of power to enact a code of criminal law for the punishment of the worst class of crimes known to civilized life when committed by Indians, there is a suggestion in the manner in which the Indian tribes are introduced into that clause, which may have a bearing on the subject before us. The commerce with foreign nations is distinctly stated as submitted to the control of Congress. Were the Indian tribes foreign nations? If so, they came within the first of the three classes of commerce mentioned, and did not need to be repeated as Indian tribes. Were they nations, in the minds of the framers of the Constitution? If so, the natural phrase would have been "foreign nations and Indian nations," or, in the terseness of language uniformly used by the framers of the instrument, it would naturally have been "foreign and Indian nations." And so in the case of *The Cherokee Nation v. The State of Georgia*, 5 Pet. 1, 20, brought in the Supreme Court of the United States, under the declaration that the judicial power extends to suits between a State and foreign States, and giving to the Supreme Court original jurisdiction where a State is a party, it was conceded that Georgia as a State came within the clause, but held that the Cherokees were not a State or nation within the meaning of the constitution, so as to be able to maintain the suit.

But these Indians are within the geographical limits of the United States. The soil and the people within those limits are under the political control of the Government of the United States, or of the States of the Union. There exist within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these. The territorial governments owe all their powers to the statutes of the United States conferring on them the powers which they exercise and which are liable to be withdrawn, modified, or repealed at any time by Congress. What authority the State government may have to enact criminal laws for the Indians will be presently considered. But this power of Congress to organize territorial governments, and make laws for their inhabitants, arises not so much from the clause in the Constitution in regard to disposing of and making rules and regulations concerning the territory and other property of the United States, as from the ownership of the country in which the Territories are, and the right of exclusive sovereignty which must exist in the national government, and can be found nowhere else. *Murphy v. Ramsey*, 114 U. S. 15, 44.

In the case of *American Ins. Co. v. Canter*, 1 Pet. 511, 542, in which the condition of the people of Florida, then under a territorial government, was under consideration, Marshall, Chief Justice, said: "Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result necessarily from the fact that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the



source whence the power is derived, the possession of it is unquestioned."

In the case of the *United States v. Rogers*, 4 How. 567, 571, where a white man pleaded in abatement to an indictment for murder committed in the country of the Cherokee Indians, that he had been adopted by, and become a member of the Cherokee tribe, Chief Justice Taney said: "The country in which the crime is charged to have been committed is a part of the territory of the United States, and not within the limits of any particular State. It is true it is occupied by the Cherokee Indians. But it has been assigned to them by the United States as a place of domicile for the tribe and they hold with the assent of the United States and under their authority." After referring to the policy of the European nations, and the United States in asserting dominion over all the country discovered by them, and the justice of this course, he adds: "But had it been otherwise, and were the right and the propriety of exercising this power now open to question, yet it is a question for the law-making and political departments of the government, and not for the judicial. It is our duty to expound and execute the law as we find it, and we think it too firmly and clearly established to admit of dispute, that the Indian tribes, residing within the territorial limits of the United States, are subject to their authority, and when the country occupied by one of them is not within the limits of one of the States, Congress may by law punish any offense committed there, no matter whether the offender be a white man or an Indian.

The Indian reservation in the case before us is land bought by the United States from Mexico by the treaty of Guadalupe Hidalgo, and the whole of California, with the allegiance of its inhabitants, many of whom were Indians, was transferred by that treaty to the United States.

The relation of the Indian tribes living within the bor-

ders of the United States, both before, and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character.

Following the policy of the European governments in the discovery of America towards the Indians who were found herein, the colonies before the Revolution and the States and the United States since, have recognized in the Indians a possessory right to the soil over which they roamed and hunted and established occasional villages. But they asserted an ultimate title in the land itself, by which the Indian tribes were forbidden to sell or transfer it to other nations or peoples without the consent of this paramount authority. When a tribe wished to dispose of its land, or any part of it, or the State or the United States wished to purchase it, a treaty with the tribe was the only mode in which this could be done. The United States recognized no right in private persons, or in other nations, to make such a purchase by treaty or otherwise. With the Indians themselves these relations are equally difficult to define. They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.

Perhaps the best statement of their position is found in the two opinions of this court by Chief Justice Marshall in the case of the *Cherokee Nation v. Georgia*, 5 Pet. 1, and in the case of *Worcester v. State of Georgia*, 6 Pet. 515, 536. These opinions are exhaustive; and in the separate opinion of Mr. Justice Baldwin, in the former, is a very valuable resume of the treaties and statutes concern-

ing the Indian tribes previous to, and during the Confederation.

In the first of the above cases it was held that these tribes were neither States nor nations, had only some of the attributes of sovereignty, and could not be so far recognized in that capacity as to sustain a suit in the Supreme Court of the United States. In the second case it was said that they were not subject to the jurisdiction asserted over them by the State of Georgia, which, because they were within its limits, where they had been for ages, had attempted to extend her laws and the jurisdiction of her courts over them.

In the opinions in these cases they are spoken of as "wards of the nation," "pupils," as local dependent communities. In this spirit the United States has conducted its relations to them from its organization to this time, but, after an experience of a hundred years of the treaty making system of government, Congress had determined upon a new departure to govern them by acts of Congress. This is seen in the act of March 3, 1871, embodied in Sec. 2079 of the Revised Statutes.

"No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, eighteen hundred and seventy-one, shall hereby be invalidated or impaired."

The case of *Crow Dog*, 109 U. S. 566, in which an agreement with the Sioux Indians, ratified by an act of Congress, was supposed to extend over them the laws of the United States and the jurisdiction of its courts, covering murder and other grave crimes, shows the purpose of Congress in this new departure. The decision in that case admits that if the intention of Congress

had been to punish by the United States; the murder of one Indian by another, the law would have been valid. But the court could not see, in the agreement with the Indians sanctioned by Congress, a purpose to repeal Sec. 2146 of the Revised Statutes, which expressly excludes from that jurisdiction the case of a crime committed by one Indian against another in the Indian country. The passage of the act now under consideration was designed to remove that objection, and to go further by including such crimes on reservations lying within a State.

Is this latter fact a fatal objection to the law? The statute itself contains no express limitation upon the powers of a State or the jurisdiction of its courts. If there be any limitations in either of these, it grows out of the implication arising from the fact that Congress has defined a crime committed within the State, and made it punishable in the courts of the United States. But Congress has done this, and can do it, with regard to all offenses relating to matters to which the Federal authority extends. Does this authority extend to this case?

It will be seen at once that the nature of the offence (murder) is one which in almost all cases of its commission is punishable by the laws of the State, and within the jurisdiction of their courts. The distinction is claimed to be that the offense under the statute is committed by an Indian, that it is committed on a reservation set apart within the State for residence of the tribe of Indians by the United States, and the fair inference is that the offending Indian shall belong to that or some other tribe. It does not interfere with the process of the State courts within the reservation, nor with the operation of State laws upon white people found there. Its effect is confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of the reservation.

It seems to us that this is within the competency of Congress. These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive and by Congress, and by this court, whenever the question has arisen.

In the case of *Worcester v. The State of Georgia*, above cited, it was held that, though the Indians had by treaty sold their land within that State, and agreed to remove away, which they had failed to do, the State could not, while they remained on those lands, extend its laws, criminal and civil, over the tribes; that the duty and power to compel their removal was in the United States, and the tribe was under their protection, and could not be subjected to the laws of the State and the process of its courts.

The same thing was decided in the case of *Fellows v. Blacksmith and others*, 19 How. 366. In this case, also, the Indians had sold their lands under supervision of the States of Massachusetts and of New York, and had agreed to remove within a given time. When the time came a suit to recover some of the land was brought in the Supreme Court of New York, which gave judgment for the plaintiff. But this court held, on writ of error, that the State could not enforce this removal, but the duty and the power to do so was in the United States. See also the case of the *Kansas Indians*, 5 Wall. 737; *New York Indians*, 5 Wall. 761.

Immunities of  
sovereign in  
foreign terri-  
tory.

The immunities from local jurisdiction which a sovereign possesses when in foreign territory are complete, provided he is traveling in his capacity as sovereign. He cannot be dragged before the civil or criminal courts, nor can his house be entered by the police authorities, as these things would interfere with, if not render impossible, his performance of the duties which he owes to his own state. For like reasons these immunities are extended to his suite. He may, in order to prevent fraud, be required to furnish an official list of those who constitute his suite. It is scarcely necessary to say that these immunities do not deprive a state of its right of self-defense, so that if a sovereign commits acts, or permits his suite to commit acts, which endanger the public peace and safety it may expel him and them from its territory. Nor is he allowed to make his house an asylum for persons other than his suite who are wanted by the police authorities. Though the latter may not enter his house, it is his duty to surrender the refugee upon demand, and a refusal upon his part would warrant his expulsion from the state and the use of force in preventing him from taking the refugee with him. When a sovereign is traveling in a foreign state *incognito*, he is subject to the local jurisdiction the same as any other private individual. Yet if the exercise of such jurisdiction deprives him of his ability to render the proper service to his own state and hence become inconsistent with his duties to it, he may resume his proper character and claim the immunities pertaining to the same. If a sovereign owes duties to a foreign state as its subject, his character as sovereign does not exempt him from the jurisdiction of that state to compel the performance of such duties. So also if a sovereign owns land in a foreign state, such land is subject to local jurisdiction.

Very similar to the immunities of a sovereign, but of more practical importance at present, are the immunities

of diplomatic agents. However, the immunities of the latter have in some cases been cut down below the limit of immunities accorded to sovereigns. Count Gyllenborg, the Swedish ambassador to Great Britain, was arrested, in 1717, and held on suspicion of complicity in a plot against the Hanoverian dynasty. The following year Prince Cellamare, the Spanish ambassador in Paris, was arrested on the charge of having organized a conspiracy against the government of the Duke of Orleans and was for a time held as a hostage. Although these acts did not pass without protest, they were never disavowed and the protests were finally withdrawn. As diplomatic agents are exempt from the criminal jurisdiction, except in emergencies, *a fortiori* they are exempt from the civil jurisdiction of the locality. The ground upon which the immunities rest is, as in the case of the sovereign, general convenience. And so long as the conviction remains that upon the whole it is an advantage to promote the business of state even at the cost of some inconvenience and sacrifice of jurisdiction that long the immunities will continue to be recognized. The immunities of a diplomatic agent are extended to his family and suite. Great Britain alone does not grant the immunity to the non-official members of the suite; so that when in 1790 the coachman of Mr. Gallatin, United States minister at London, committed an assault, while not in the house of the minister, the local authorities claimed jurisdiction over him. It is admitted by all that the house of a diplomatic agent is exempt from local jurisdiction, except where the agent has sacrificed his immunity by a crime of a particularly grave character.

Immunities of  
Diplomatic  
agents.

Exemption from  
civil and crim-  
inal jurisdic-  
tion.

Gallatin's Case.

To what extent the house of a diplomatic agent may furnish refuge to political and other criminals subject to the jurisdiction of the local authorities, differs in different countries. In Europe it is not permitted, and this is the general rule. But, for Central and South America, a dif-

ferent rule has been established. The frequency of revolutions in these countries has rendered this departure from the general rule of international law advisable.

**Immunities  
from taxation.**

The immunities of a diplomatic agent from taxation are confined to his person, personal effects and property held in his representative capacity. Though he has no legal immunity from taxation on goods brought in by him for his private use, such privilege is usually extended to him as a matter of courtesy.

**From giving  
testimony.**

A diplomatic agent cannot be compelled to appear in the local courts to give testimony. But with reference to this they are expected to be reasonable. The immunity is accorded to relieve them of the necessity of spending a considerable amount of time in court which might be needed for the performance of their duties to their state. But when the administration of justice in an important case demands their presence and testimony in court they ought not to stickle for privileges. An extreme case of this is that the Dutch minister at Washington who was an eye-witness to a murder but refused to give testimony in court with reference to it, insisting that he could not be compelled to appear in court, but that as a favor he would, with the consent of his government, allow his deposition to be taken at the legation. But as our laws guarantee to the accused the right "to be confronted with the witnesses against him," the deposition of the Dutch minister would be useless. And as his government supported him in his refusal, his evidence, in a practical form, could not be secured. The United States expressed its disapproval by demanding his recall.

**Case of Dutch  
minister at  
Washington.**

**Immunities of  
armed forces.**

The armed forces of a state when in the territory of a friendly foreign state are entitled to immunity from local jurisdiction. This immunity rests upon expediency, as it would be extremely difficult for a commander to control his forces if the jurisdiction over them rested in another.



So that in the absence of convention he is accorded exclusive jurisdiction.

As a result of the right of an independent state to supreme control within its territory, subject to the above Responsibility of State for acts done within its territory. limitations, there exists as a correlate to this right a responsibility for acts and omissions within said territory. These acts and omissions may be grouped under four heads:

- (1) acts done or omitted by the military or naval forces,
- (2) by administrative officers, (3) by judicial tribunals,
- (4) by private persons.

With reference to the first two classes the power of control by the state is so great that there can be no question as to the liability of the state for violation of the law of Classes 1 and 2 considered. nations committed by them. The usual course is to disavow the act and make reparation. A refusal to do this, and sometimes a refusal to punish the offenders, may be considered by the injured state as a *casus belli*.

The control of the state over its judiciary is by no means so great and hence its acts are by no means so representative of the will of the state.

As the independence of the judiciary is a recognized fact among civilized states a demand that they be punished for decisions contrary to the law of nations as a result of Acts of judiciary. which another state suffers injury is never made. Neither is a state expected to disavow the decision, since it may be in accordance with the municipal law of the territory in which it is made even though contrary to international law. The most that is ever asked is compensation for the losses, and this is generally rendered and sometimes the legislation under which the decision was rendered is amended; this however cannot be required.

The liability of a state for injuries committed by its private citizens is dependent upon the degree of knowledge Acts of private citizens. which it possesses with reference to the commission of such acts and the diligence used in preventing them.

Geneva Arbitration

If a state either has no knowledge that acts which will result in injury to another state are about to be committed by its citizens or, if knowing, it uses proper diligence in preventing them it is clear that no liability attaches. If upon the other hand the preparation is open and notorious, and either no attempt at all or a half-hearted one is made to prevent the consummation of the actor acts, the state by such negligence becomes morally and legally liable for the resulting losses and also to punish the offenders, as a failure to punish may be viewed as a ratification of the acts. This matter has several times been the subject of dispute between the United States and Great Britain. By far the most important of these disputes culminated in the Geneva Arbitration. The degree of diligence which was accepted as a standard in these proceedings was a decided advance upon what had been recognized up to that time and may safely be considered as the standard at the present time.

Injuries due to war or insurrection.

A state does not incur liabilities for injuries caused to foreigners or their property within its territory, if such injuries are a result of war or insurrection. The risk of such losses is assumed by all who go into a state or own property within it, and if the state does not choose to compensate those who have suffered from such causes it is under no legal obligation to do so. In this the foreigner and citizen are upon the same footing.

## SECTION II. EQUALITY OF STATES.

Ever since the time of Grotius it has been a fundamental principle of international law that all independent states are equal. This of course does not mean that they are equal in power, territory, wealth or influence — for everybody knows that they are not, it means simply that they are equal in point of legal rights. The principle is analogous to that of the equality of individuals in

municipal law. As in the one case so in the other it has too often been disregarded by those who have a greater respect for their own desires than for law. But it must not be concluded from this that the principle is valueless. It has undoubtedly been a protection to weaker states. The reputation of being a violator of law is not a desirable one and is not one which a state any more than an individual can well afford to acquire. Therefore, the unwillingness to acquire such a reputation does exercise a restraining influence over powerful states which would disregard the rights of weaker independent states to a greater extent and more often, were it not that by so doing they would be violating the law of nations.

Equality of States.

It has been intimated by some that this principle is becoming obsolete. And, indeed, their claim is not entirely without foundation.

The six great powers of Europe known as the Concert of Powers, claim and exercise rights which they do not concede to the smaller states. Particularly in the case of Turkey, and Greece, which are nominally independent states, the Concert of Powers has exercised supervisory powers which do not accord with the principle of equality. Turkey has been compelled to give up a part of her territory at the bidding of the Concert, and Greece was forced by a pacific blockade to disband her armed forces. Later, the Concert kept Greece from annexing Crete, and, upon its own initiative, rather than upon a request for mediation, dictated the terms of settlement of the war between Greece and Turkey in 1897.

Greece and Turkey, exceptional cases.

Nor is the evidence that, in practice, the principle of the equality of states is modified to meet the exigencies of the situation confined to the European side of the Atlantic. It is perhaps needless to say that we refer to certain acts of the United States in pursuance of the Monroe Doctrine. To many the Monroe Doctrine seems in itself antagonis-

Monroe Doctrine and Equality.

tic to and inconsistent with the principle we are now discussing. But it must not be forgotten that the Monroe Doctrine does not purport to be and is not a principle of law; it is simply a political policy of the United States. This policy is not, in the main, nor are the acts done in pursuance of it an infringement of the principle of the equality of states. In essence it is a declaration of the equal rights of all American states, with those of Europe, to determine upon the form of their own institutions of government. And whether correctly or not, it has been believed by the United States for nearly a century that any interference with this right would be a menace to its peace and safety. The United States interfered in Mexico, not for the purpose of abridging any of the legal rights of either France or Mexico, but for the purpose of securing to Mexico the fundamental right of determining freely the form of her own government. And that this decision might express the will of the people of Mexico, we considered it necessary that it be made without the coercion of French arms. So far then as what we did toward settling the difference between Napoleon and Mexico, there is nothing which contravenes the principle of the equality of states.

**Intervention in  
Mexico.**

In the diplomatic pressure which we brought to bear upon Chile for the purpose of bringing about a settlement between her and Peru, there was at one stage the semblance of an assumption of superiority; but as this was toned down to an offer of mediation there was nothing done in derogation of the principle of equality.

**Case of Chile.**

In forcing England to submit to arbitration its dispute with Venezuela over their boundary line, the evident consequences of our act was to promote rather than to destroy the equality of states. Though in form our action was not a model of diplomatic tact, it is hard to see how diplomatic pressure could be used more effectively for the

**Case of England  
and Venezuela.**

purpose of promoting the equality of states than it was in this instance.

When Venezuela was attacked by the allies in 1902, the United States did not object to their using force for the purpose of collecting debts, as they had a legal right to do, but did object to their acquiring territory upon the "American Continent," which, as the event proved, was not necessary. Here again our action deprived no state of its substantial rights, and one's mind would have to be peculiarly constituted to argue that it did not, by promoting the principle of arbitration as a substitute for force, promote the real equality of states.

Case of the allies v. Venezuela.

It is true that the Monroe Doctrine, in so far as it denies to the smaller American states the right to voluntarily alienate their territory to European states, does abridge one of the rights of states. Nor can it be denied that such an interpretation has been put upon it by our government. It has even gone further, and denied to non-American states having territory in this hemisphere the right to dispose of it in a way that might prove dangerous to our safety. This interpretation was reiterated a number of times while Spain held Cuba; and there is little room to doubt but that the United States would question the right of Denmark to sell her territory in the West Indies to Germany. Whatever may be the case in the distant future, it may be stated with a reasonable degree of certainty that for the near future the United States will continue to adhere to the Monroe Doctrine to the extent of using force, if necessary, in order to secure respect for it. But granting all this, the principle of equality of states is not more endangered than is any other principle of law. For it is extremely doubtful if the time will ever come when the law of self-preservation, or what is considered to be the law of self-preservation, will yield to any other law.

Veto on free disposition of Territory by smaller American States.

Though it is hazardous to predict what will or will not

Monroe Doctrine of Japan.

happen as a result of war, it appears now to be very likely that, as a result of the recent war with Russia, Japan will assume the leading position among Asiatic States, or, to use a figure of speech, will declare a Monroe Doctrine for Asia, as the United States has for the Americas. Yet there is little, if any danger to be apprehended from this source, as the preponderance of Japan in Asia is not at all likely to be so great as is that of the United States in the Americas. Furthermore, the Japanese are, by nature and centuries of training, a conservative people not at all likely to "run amuck," the scarecrow talk about 'yellow peril' to the contrary notwithstanding.

All things considered we may safely conclude that the principle of the equality of states is too useful and salutary to be dropped; and that, though at times it may be violated it will continue for a long time to be a working hypothesis in the realm of international law.

Formal side of equality of states.

The formalities connected with this principle of equality of states are sometimes pushed to foolish extremes. This is most pronounced in the cases of members of the diplomatic corps, more particularly in the case of their wives. This matter is generally solved by giving to ambassadors and ministers the right of precedence according to the length of their official residence, so that the ambassador who has been in residence longest, or, to be more exact, the one who was received first, provided he has been in continuous service is dean of the diplomatic corps. It was a long time before the ambassadors of republics were considered as entitled to the same privileges, as regards rank and precedence, as those of monarchies. In Roman Catholic countries the Pope is accorded the right of precedence over all other rulers, and his agents over all other agents.

Alternat.

In the signing of treaties the form of equality is preserved by what is known as the *alternat*, which means that in the copy to be kept by a state the signature of its repre-

sentative shall appear first. In Europe, where there are several parties, the order of signing is alphabetical, according to the French name of the countries.

Equally punctilious and formal is the code of decorum for the sea. Here, when one vessel meets another a salute is necessary. The vessel whose commanding officer is of highest rank is entitled to be saluted first. In the case of warships the salute is given by firing a certain number of guns, the number depending upon the rank of the ship saluted. In the case of merchant vessels, the dipping of sails or flag is allowed to take the place of the firing of the guns, as the merchant vessel may frequently be without a gun or powder. A failure to salute is considered an insult, and an insult of such a grave nature that the British once declared war upon the Dutch, nominally at least, for failure to salute a British man-of-war. It is altogether unlikely that war could now result from such a trivial cause.

Equality Code  
for the sea.

#### VAVASSEUR v. KRUPP.

(L. R. 9 Chancery Div. 351; Snow's Cases, p. 72.)

#### IMMUNITIES OF FOREIGN SOVEREIGNS.

Josiah Vavasseur, the plaintiff in this case, had brought an action against F. Krupp, of Essen, in Germany, Alfred Longsdon, his agent in England, and Ahrens & Co., described as agents for the government of Japan, claiming an injunction and damages for the infringement of the plaintiff's patent for making shells and other projectiles. The shells in question had been made at Essen, in Germany, had been there bought for the government of Japan, had been brought to this country and landed here in order to be put on board three ships of war which were being built here for the government of Japan, to be used as ammunition for the guns of those ships. On the 18th of January, 1878, an injunction was, without prejudice to any question,

granted, restraining the defendants, and the owners of the wharf where the shells lay, from selling or delivering the shells to the Government of Japan, or to any person on their behalf, or otherwise from parting with, selling, or disposing of the shells and projectiles.

On the 11th of May an application to the court was made on behalf of the Mikado of Japan and his Envoy Extraordinary in this country, that, notwithstanding the injunction, the Mikado and his agents might be at liberty to remove the shells, and that if, and so far as might be necessary, the Mikado and his Envoy should for the purpose of making and being heard upon such application be added as defendants in the suit.

Upon this application an order was made by the Master of the Rolls that on the Mikado by his counsel submitting to the jurisdiction of this court and desiring to be made a defendant, and on payment into court by the Mikado of one hundred pounds as security for costs the name of the Mikado be added as a party defendant in the action.

Notice of motion was then given on the part of the Mikado that the injunction might be dissolved, and that the Mikado might be at liberty to take possession, and remove, out of the jurisdiction of the courts, the shells in question, the property of his Imperial Majesty.

James, L.J., Brett, L.J., and Cotton, L.J., concurred, each delivering an opinion.

The following is that of Brett, L.J.: "It does not seem to me that in this case there is any fact whatever in dispute.

" These shells were made by Krupp at Essen. That was no infringement of the plaintiff's patent. In Germany they were sold to the Mikado and paid for by the agents of the Mikado. None of these facts are in dispute; and this purchase and sale was a perfectly lawful purchase and sale. The Mikado had three ships of war building in this



country, and he desired that these shells should be sent to this country and put on board these ships. They were sent to this country by the order and by the authority of the Mikado, through Ahrens & Co. They were brought into this country, and they were deposited on a wharf. The plaintiff then finding these shells in this country, and finding, as he alleges, that they were made according to the process of his patent, asserts that the bringing them into this country by Ahrens & Co. is an infringement of his patent by them; and thereupon he brings an action against Ahrens & Co., for the infringement. In that action he claims an injunction against Ahrens & Co., and it may be that he claims an order from the court to destroy those shells because he says they are an infringement of his patent. In the course of that suit an injunction is obtained against Ahrens & Co., and against others, which injunction in terms forbids them from delivering these shells, which with other things are in their possession, to the ships of the Mikado, and in fact forbids them from sending the shells to Japan. To this action the Mikado was no party but he or his agents here come forward and claim to have the delivery and possession of these shells. The defendants in the action are not unwilling to give the shells to the Mikado, but they say, 'if we do so, it may be said that we have broken the injunction and we may therefore be liable to certain penalties.' It seems to me beyond dispute that this was the purpose for which the Mikado came in and desired to be made a party to the suit, and the Master of the Rolls thus describes the purpose. (His Lordship then read the judgment of the Master of the Rolls.) Now it is said that in the first place there is a dispute whether these shells are the property of the Mikado. It is argued that if he were a private individual, then, although he has purchased these shells and paid for them, yet, inasmuch as there has been an infringement of the patent, the property is not in him

because the court may order the shells to be destroyed. Is that argument good or not? To my mind it is utterly fallacious. The patent law has nothing to do with the property. The facts here are undisputed that Krupp made them with his own materials in Germany, where he had a right to make them; that he entered into a contract to sell specific shells to the Mikado; that that contract was performed, and that the shells were paid for, and that they were delivered in Germany to the Mikado's agent. Well, unless the patent law prevents the property from passing, nobody can doubt that the property passed to the Mikado. Therefore the dispute is not upon facts but upon a false theory of the law, that the patent law prevented the property from passing. I am clearly of opinion that the patent law did not prevent the property from passing. The goods were the property of the Mikado. They were his property as a sovereign; they were the property of his country; and therefore he is in the position of a foreign sovereign having property here.

“Whether the fact of Ahrens & Co. bringing these goods into England under these circumstances, and with this intention, was an infringement of the patent, I decline to consider. I shall assume for this purpose that it was an infringement, and that we have in this country property of the Mikado which infringes the patent. If it is an infringement of the patent by the Mikado, you cannot sue him for that infringement. If it is an infringement by the agents, you may sue the agents for the infringement, but then it is the agents whom you sue. The injunction is against the agents, the Mikado being then no party to the action, and not being forbidden to do anything. He then comes here as a sovereign, and requires the delivery of his own goods. His only difficulty is the injunction against the agents, and for the purpose of enabling the court to make an order, he what is called

‘submits himself to the jurisdiction of the court.’ I think the interpretation put by the Master of the Rolls upon the order then made is right, and that it was only an order that the Mikado might be made a defendant for the purpose of enabling the court to make the order which the court has made. He now says ‘I know not, and I care not, whether my agents have infringed your patent law. I have property in the country, which property is my own. I demand that it shall be delivered to me, and I make myself a defendant in your court merely for the purpose of your modifying the order which you have made, so that my agents may not be injured in consequence of their delivering to me my own property.’

“And the only order that the Master of the Rolls has made is that these goods may be delivered up to the Mikado; the meaning of which is that the mere fact of the Mikado taking these shells away shall not be considered as against Ahrens & Co. an infringement of the injunction. That is the whole effect of this order. The Mikado has a perfect right to have these goods; no court in this country can properly prevent him from having goods which are the public property of his own country. Therefore it seems to me that this order which is really made for the benefit of Ahrens & Co., was an order rightly made, and that this appeal cannot be sustained.”

## CHAPTER IV.

### INTERCOURSE.

#### SECTION I. DIPLOMATIC AGENTS.

Means of inter-  
course, ancient  
and modern.

Suspicion as to  
diplomatic  
agents.

While the ancient and the medieval world recognized the necessity of some means of intercourse between States, their official means were scarcely more developed than their mechanical. The changed view as to the necessity is evidenced by the change from temporary agents of diplomatic intercourse to that of permanent legations. This change was not brought about until after the Peace of Westphalia, 1648. Strange as it may seem, this change had to fight its way against a strong prejudice and this prejudice was to be found in places where we would least expect to look for it. Even the liberal-minded Grotius considered permanent embassies as not "necessary." And Coke, one of the greatest legal minds of England, commends Henry VII. as "a wise and politique king" in that he "would not in his time suffer lieger ambassadors of any foreign king or prince within his realm, but upon occasion used ambassadors." (Coke's Institutes, IV., Ch. 26.) The prevalent misconception of the purpose of permanent ambassadors was well brought out by Bynkershoek in his definition of them as agents who "are maintained at friendly courts, not for special but for general purposes, even for the sake of what they can find out." (De Foro Legatorum, Sec. I.) This was written as late as 1721. But necessity triumphed over prejudice and permanent legations have become a fixed institution or piece of machinery in the diplomatic intercourse of states. While no definite date can be given as marking the change, it was established by the middle of the seventeenth century.

Almost from the first, the permanent diplomatic agents have been divided into classes. For some time there were two main classes: those possessing representative character, and those who did not. Representative character is, according to Vattel, "the faculty possessed by the minister, of representing his master even in his very person and dignity." (Law of Nations, Book IV., ch. 6, sec. 70, p. 459 of Chitty's Ed.) Those who did not possess the representative character could nevertheless represent their master in his "rights and the transaction of affairs." (Ibid.) These latter were termed envoys, and were divided into envoys ordinary and envoys extraordinary, the latter taking precedence over the former. Gradually a third class, that of residents, was formed. These differed in no essential respect from envoys, but in ceremonials the latter took precedence over them. And Vattel tells us that "a custom of still more recent origin has introduced a new kind of ministers without any particular determination of character. These are called simply *ministers*, to indicate that they are invested with the general quality of a sovereign's mandatories, without any particular assignment of rank or character. It was likewise the punctilio of ceremony which gave rise to this innovation." (Ibid. p. 460.) But it was not until the Congress of Vienna that there was a positive and official classification.

This Congress divided diplomatic agents into the following classes: (1) Ambassadors, legates and nuncios; (2) Envoys, ministers and others accredited to sovereigns; (3) Chargés d'affaires accredited to ministers of foreign affairs. (Recez, Congress of Vienna, March 19, 1815.)

The difference between ambassadors and legates is that the former are accredited by states, whereas the latter are accredited by the Pope. As between legates and nuncios, both of whom are accredited by the Pope, the difference is that the former are ambassadors extraordinary sent upon

Classes of Dip.  
agents.

Classification by  
Congress of  
Vienna.

special missions, are always cardinals, and are sent only to states acknowledging the supremacy of the Pope, whereas the latter are never cardinals but are ordinary resident ambassadors.

The distinction between *chargés d'affaires ad hoc* and *ad interim* is that the former are accredited originally to the minister of foreign affairs, while the latter are members, usually the first secretary, of the legation promoted temporarily to the position of *chargé d'affaires* during the absence of the ambassador or minister. This is not infrequently for the purpose of getting work done which their chief does not care to do.

In the second article of this *recez* it is provided that only ambassadors, legates and nuncios have the representative character; and in article 3, that diplomatic agents on an extraordinary mission should not for that reason have any superiority of rank; and by article 4, that diplomatic agents shall take rank in their respective classes according to the date of the official notification of their arrival.

Amendment by  
treaty of Aix la-  
Chapelle.

This classification resulted in so much dissatisfaction that by the protocol of the Congress of Aix-la-Chapelle another class, that of *ministers resident* was formed "in order to avoid the disagreeable discussions which might take place in the future on a point of diplomatic etiquette, that the annex to the *recez* of Vienna, by which questions of rank have been regulated, does not appear to have foreseen, it is decreed between the five courts that *ministers resident* hereafter accredited will form, in respect to rank, an intermediate class between ministers of the second order and *chargés d'affaires*." (Protocol of the Congress of Aix-la-Chapelle of the 21st of November, 1818.)

The classification thus amended has remained till the present time. But it has lost much of its meaning. For practical purposes, the distinction between those having and those not having the representative character has

passed away. The right of personal audience, once confined to members of the first class, has gradually been extended to all diplomatic agents. The right of solemn entry which remained alone to ambassadors was a form of worse than useless pageantry which has become practically obsolete, except at Madrid. Thus, what was intended as a practical classification has, owing largely to the growing spirit of democracy, and the progress of constitutional government, degenerated into a mere guide-book for diplomatic etiquette. Solemn entry.

It was not at first conceded that diplomatic representatives of republics were entitled to the same rights and privileges as monarchical representatives of the same class, but that theory has been forced to give way before the irresistible logic of facts. Yet so late as the end of the 18th century the establishment of the new rule was so doubtful that the Republic of France thought it necessary to embody it in her treaties with other European states. Now, the rule of equality is well recognized so that no matter what the form of government or size of the state, diplomatic agents of like rank are upon the same plane. There is this much that is democratic about the code of diplomatic etiquette. Diplomatic representatives of Republics.

There is no positive rule determining the rank of diplomatic agent which a given state shall send. Each sovereign state has of course the right to determine that for itself. But it is almost an invariable rule that each state send to another state an agent of the same rank as that state sends to it. Whenever a change is desired it is brought about by agreement effected through the ordinary diplomatic channels, or, without waiting for an agreement, a state may increase the rank of its minister to a given state, and this compliment, for so it is considered, is always promptly returned. Rank sent and received usually the same.

It is only within comparatively recent years that the

United States has had any diplomatic agents of the first class. Now it has ambassadors at the courts of England, France, Germany, Italy, Russia, Austria, Brazil, and Mexico. Within the past month it has arranged to raise the rank of its minister to Japan to that of ambassador. It has frequently been suggested that we should abolish all distinction in this regard between large and small states by sending ambassadors to all alike. The only objection to this is the increased expense it would necessitate, — a matter which with small states would be a considerable item, for they would of course think it their duty to send ambassadors to us in return.

**Letter of Credence.**

The rank of a diplomatic agent is shown by his letter of credence. This is issued under the seal of his own government, and gives his name, and rank, and is an official guarantee that confidence may be placed in what he has to communicate. The form of letters of credence varies with the accrediting state. Yet there are two main forms: *lettre de cabinet* and *lettre de chancellerie*. The *lettre de chancellerie* is written in the third person and is a very long and formal document. The *lettre de cabinet* is written in the first person and is by some states made very short and simple. The former is used by several of the states of continental Europe; Russia, in particular, still retains it in its most virulent form. Great Britain and the United States use the *lettre de cabinet*. The letter of credence of a chargé d'affaires is addressed by the minister of foreign affairs of the accrediting state to the corresponding official of the receiving state, instead of running in the name of the chief magistrate of the respective states, as is the case with diplomatic agents of the first three classes.

**Special letters of credence.**

If a diplomatic agent is called upon to enter into special negotiations, as, for instance, the signing of a treaty, he is furnished with special letters of credence, generally



known as letters patent, stating the powers with which he is clothed for the purpose of that particular transaction. The ordinary letter of credence does not cover special negotiations. Diplomatic agents sent to a congress or conference are not furnished with letters of credence but with what are known as limited full powers, copies of which are exchanged or placed in the hands of the presiding officer.

Diplomatic agents, particularly those sent on special missions, are usually, if not always, furnished with instructions from their government advising them as to what should be done under given contingencies. Those given the agent at the beginning of his mission are now much less elaborate than formerly, because of the ease with which additional instructions may be asked for and received by cable. It has always been considered the better plan not to bind an agent down too closely by instructions, but rather to choose a man in whose judgment his government has confidence and leave him as free as possible to act as may seem best under all the circumstances. If a diplomatic agent disregards his instructions, this does not affect the validity of his act. The extent of his powers is determined by his letters of credence or letters patent, not by his instructions of which the party with whom he is dealing has no notice.

A notable case of an admitted disregard of instructions is that of Monroe in the negotiations for the purchase of Louisiana. Though his instructions limited him to a small piece of territory at the mouth of the Mississippi he seized the opportunity of securing a good bargain by disregarding his instructions and purchasing the whole of Louisiana.

The official term of service of a diplomatic agent, so far as international law is concerned, begins from his reception by the power to which he is accredited, though by municipal law it is usually made to begin from the

date of his appointment. Its termination will be considered presently.

Refusal to accept Dip. Agt.—  
grounds for.

The state to which a diplomatic agent is sent may refuse to receive him and its refusal may be based either on the ground of a lack of competency upon the part of the accrediting state or upon objections to the particular person sent. The first arises in the case of states, or, to be more exact, political communities whose independence has not yet been fully established, or has in part been lost. The state to which a diplomatic agent is accredited undoubtedly has the right to refuse to receive him upon the ground that he is *persona non grata*. Whether the specific reasons need be given is perhaps doubtful. Among the reasons which have been regarded as sufficient for refusing to accept, on personal grounds, are: (1) The special character in which he comes. Upon this ground Queen Elizabeth refused to receive the nuncio of Pius IV., because of the effect which the reception of an agent of such religious character might have upon her subjects. For a similar reason the Pope refused to receive Prince Hohenloe, because as cardinal he was ex-officio a member of the curia. (2) When the agent is politically hostile to the receiving state or sovereign. This has been extended to include the allies of the receiving state or sovereign; as, for instance, Francis I. refused to receive Cardinal Pole because he was politically hostile to the ally of Francis, Henry VIII. (3) Any acts or characteristics of the agent which might render him personally distasteful to the receiving power. Richelieu refused to receive an ambassador from Charles I. because he had been so inconsiderate as to flirt with the Queen of France. (4) Where the agent is one of its own citizens. Because of the extritorial rights of diplomatic agents it has come to be a rule with many states not to receive its own subjects as agents. If, however, a state does receive one without an express reservation of its jurisdiction over

him as a subject, he is entitled to the ordinary immunities of diplomatic agents.

Though it is unusual to do so, a state may receive a diplomatic agent conditionally, provided the conditions upon which he is received are expressed either before or at the time of his reception. There must however be no conditions attached which would be inconsistent with the dignity of the accrediting state. Or, as President Adams put it, the conditions upon which a diplomatic agent is received should not "be expressed in terms which may countenance the inadmissible pretension of a right to prescribe the qualifications which a minister from the United States should possess." (Second Annual Address, 1798.) Conditional reception.

In the case of Mr. Keiley, who in 1885 was accredited by the United States as minister to Austria-Hungary, and from whom the latter government reserved the right to withhold certain honors, to which pretensions our Secretary of State, Mr. Bayard, replied, that "the ground upon which it is announced that the usual ceremonious courtesy and formal respect are to be withheld from this envoy of the United States to your government, that is to say, because his wife is alleged or supposed by your government to entertain a certain religious faith, and to be a member of a certain religious sect, cannot be assented to by the executive of the government of the American people, but is and must be emphatically and promptly denied." (Correspondence with Baron Schaeffer, May 18, 1885.) As Austria would not withdraw the condition, the United States, rather than yield to what she considered to be unreasonable conditions, sent no minister but intrusted the secretary of the legation with the duty of representing us at the court of Vienna under the title of *chargé d'affaires ad interim*. Keiley's case.

In order to avoid embarrassment to both the accrediting state and to the representative, it is not unusual to sound the authorities of the receiving state in advance as to Acceptability ascertained in advance.

whether or not the contemplated appointee would be *persona grata*. There is, of course, little to be gained and much to be lost by forcing upon a state an agent who is personally not agreeable to it. Hence, unless what is conceived to be an important principle is involved, there is no attempt made to force upon another state a diplomatic agent who is not in every way agreeable to it.

**Right of innocent passage.**

Bearing in mind what has been said, under the title of extritoriality, with reference to the immunities of diplomatic agents, we will now notice some additional matters. The diplomatic agent upon producing his passports has the right to innocent passage in order to reach the capital where he is to reside, or place at which his duties are to be performed. Though up to the time of Grotius and for a hundred years later this right did not exist as against any but the state to which the envoy was accredited, by the time of Vattel, the middle of the eighteenth century, it was extended so as to include all states with which the accrediting state is at peace. With reference to this, Vattel says: "These passports sometimes become necessary to him in the countries through which he passes on his way to the place of his destination; and, in case of need, he shows them, in order to obtain the privileges to which he is entitled. It is true, indeed, that the prince alone to whom the minister is sent is under any obligation, or particular engagement, to insure him all the rights annexed to his character. Yet the others through whose dominions he passes are not to deny him those regards to which the minister of a sovereign is entitled, and which nations reciprocally owe to each other. In particular, they are bound to afford him perfect security." (Law of Nations, Bk. IV, Ch. 7, Sec. 84.) The state through which he is to pass may, however, require him to go over a particular route marked out by it and may fix the amount of time to be consumed by him in passing through its territory.

The French government invoked this rule in the case of Mr. Soulé, the minister of the United States to Spain, in 1854. Speaking for his government the French minister of foreign affairs said: "The Emperor has not wished, as you appear to think, to prevent an envoy of the United States from crossing French territory to go to his post to acquit himself of the commission with which he is charged by his government; but between this simple passage and the sojourn of a foreigner whose antecedents have awakened, I regret to say, the attention of the authorities invested with the duty of securing the public order of the country, there exists a difference, which the minister of the interior had to appreciate. If Mr. Soulé was going immediately and direct to Madrid, the route of France was open to him; if he was coming to Paris to sojourn there, that privilege was not accorded him." (Mr. Drouyn de L'Huys to Mr. Mason, United States minister at Paris, Executive Documents No. 1, 33rd Cong, 2nd session.) Case of Soulé.

In time of war an envoy accredited to a friendly state may not cross the territory of a state at war with his own, except a safe-conduct be furnished him by such hostile state. If this is refused he has no right on its territory and may be arrested in accordance with international law; for all friendly intercourse being suspended between the two nations during the war he has no rights in the territory of his enemy, except as a matter of grace. If, then, safe-conduct is refused, he becomes a trespasser, provided he attempts to cross regardless of the refusal. Thus when Marechal de Belleisle, the French ambassador to Berlin, was arrested and imprisoned in London for attempting to cross Hanoverian territory in going to Berlin at a time when England, to which said territory belonged, was at war with France, no protest was made by his country. Safe conducts.  
Case of Marechal de Belleisle.

The right of a diplomatic agent to communicate with his own government should, except there be substantial

evidence that he is abusing the privilege, be preserved as inviolably as his house or his person.

Despatches of  
Dip. Agt.

This question came up during the Franco-Prussian war in the following way: during the siege of Paris, despatches from Mr. Washburne, the minister of the United States to France, were refused passage through the German lines unless they were left unsealed. This led to a spirited protest by Mr. Fish, our Secretary of State, who put the following question and then answered it: "When, however, the blockaded fortress happens to be the capital of the country where the diplomatic representative of a neutral state resides, has the blockading force a right to cut him off from all intercourse by letter with the outer world, and even with his own government? No such right is either expressly recognized by public law, or is even alluded to by any treatise on the subject. The right of legation, however, is fully acknowledged, and, as incident to that right, the privilege of sending and receiving messages. Indeed, the rights of legation under such circumstances must be regarded as paramount to any belligerent right. They ought not to be questioned or curtailed, unless the attacking party has good reason to believe that they will be abused, or unless some military necessity, which upon proper statement must be recognized as obvious, shall require the curtailment." To this, Count Bismarck replied that "the delays occurring now and then in the transmission of your dispatch-bag were not occasioned by any doubt as to the right of your government to correspond with you, but by obstacles it was out of my power to remove." The incident was closed by the assurance from Mr. Fish that "in the absence of any recurrence, we are content with the recognition so fully made by Count Bismarck of the right which we claim." (Correspondence of Mr. Fish with Mr. Washburne, 1871.)

The ceremonial upon the reception of diplomatic agents

is a subject which belongs more properly in a work on diplomacy than in one on international law. For, most of Ceremonials. the forms involve no question of law. Within reasonable limits a state has undoubtedly the legal right to prescribe any form of reception it sees fit. But the question may be raised as to whether or not it is within the legal rights of a state to prescribe a form of c  remonial, like ketow, which is derogatory to the dignity of both the envoy and his country. As the right of a state to have an embassy in another friendly state is established, that would seem to carry with it the right, independent of treaty, to have its ambassadors received in a way not odiously suggestive of inferiority.

If for any reason a diplomatic agent becomes *persona non grata*, his recall may be requested of his government, and, if his government refuses or fails to recall him, he may Recall. be dismissed. In this of course a state is expected to be reasonable and not dismiss or request the recall of the diplomatic agent of a friendly state for mere trifles. A state is not under obligations to recall its diplomatic agent merely upon request from another state. It has a right to know what are the charges against him and whether or not those charges are supported by a reasonable amount of evidence. If, in its judgment, either of these is insufficient, it may rightly refuse to recall him. This will of course not prevent the other state from dismissing him. Dismissal.

Dismissal may rest upon either one of two grounds: (1) Action by the accrediting state which renders a continuance of diplomatic relations undesirable; (2) Misconduct upon the part of the agent. In this case the grounds of dismissal should be formulated, so that it may be clear to his state and to the world whether or not there was a just cause for subjecting him to such humiliation.

In 1793, Washington was forced to demand the recall Case of Genet. of the French minister to this country, Mr. Genet, for his

persistence in open violations of American neutrality. The French government acquiesced and no controversy resulted. In fact, Washington had exhibited a remarkable patience to tolerate Genet as long as he did. When the course of conduct pursued by their minister was brought to the attention of the Council of the French Republic it demanded the "arrest of Mr. Genet and all the other agents who may have participated in his faults and sentiments."

**Case of Yrujo.**

Far less prompt was the Spanish government, when, about ten years later, the United States demanded the recall of its minister, Mr. Yrujo, for attempting to bribe a Philadelphia newspaper to advocate the Spanish side of the boundary dispute between the United States and his country. The Spanish government did not question the ground upon which recall was demanded, nor the proof, but instead of recalling him at once allowed him to retire on leave of absence "at such season of the year as might be convenient to him." Upon this hint he remained in Washington for three years longer. There is not a little about this case that is characteristic of Spanish diplomatic methods.

**Case of Jackson.**

In 1809, the United States demanded the recall of the British minister, Mr. Jackson, the main ground of the demand being his charge that the Secretary of State had, as an act of falsehood and duplicity, concluded an agreement with his predecessor, Mr. Erskine, "in violation of that gentlemen's instructions which were at the time, in substance, made known to you." It was also alleged that he had given offensive "toasts at public dinners at Boston." The British government was not satisfied that any intentional offense had been given; but "in order to show its friendliness to the United States" it consented to his recall, at the same time placing upon record that "His Majesty has not marked with any expression of displeasure the conduct of Mr. Jackson, who does not appear to have



committed any intentional offense against the United States." (Lord Wellesley's reply to Mr. Pinckney, 3 American State Papers.)

In 1871, the United States diplomatically informed the Russian government that "under the circumstances, <sup>Case of Cata-</sup> the president is of opinion that the interests of both <sup>cazy.</sup> countries would be promoted and those relations of cordiality with the government of the Czar, of the importance or which he is well aware, would be placed upon a much surer footing, if the head of the Russian legation here was to be changed." This request was made upon the ground that "the conduct of Mr. Catacazy, the Russian minister at Washington, having been for some time past such as to materially impair his usefulness to his own government, and to render intercourse with him for either business or social purposes highly disagreeable." As usual, Russian diplomacy moved slowly, giving as an excuse the impracticability of making a change upon the eve of the visit of a Russian grand duke. But the United States sent a second communication informing the Czar that "the President cannot be expected to receive as principal attendant of his highness one who has been abusive to him and is personally unacceptable;" stating further in a subsequent dispatch that "if there be delay or difficulty in obtaining such recall, his passports, in case of continued misconduct on his part, may be sent him forthwith." (Letter of Sec. Fish to Mr. Catacazy, Nov. 10 and 16, 1871.)

In 1848, the Spanish government, which was at that time under reactionary influences, dismissed Mr. Bulwer, <sup>Case of Bulwer.</sup> the British minister, summarily by giving him his passports and intimating that he leave Madrid within 48 hours. The grounds of dismissal were his alleged participation in local politics and encouraging revolt. As the British government was not satisfied with the proof it responded by dismissing the Spanish minister at London, thus severing

diplomatic intercourse between the two countries as a mark of displeasure.

**Case of Lord  
Sackville.**

In 1888, Lord Sackville, the British minister at Washington, was guilty of such indiscretion that his recall was demanded. The ground of the demand was his interference in American politics. The fact was that just previous to the presidential election of that year a person residing in the West who still "considered England his motherland," wrote to Lord Sackville asking him "privately and confidentially" how he should vote at the coming election and whether Cleveland, if elected, would adopt a policy friendly to England. The letter was written for the purpose of making political capital out of the reply, but the unwary lord fell into the trap and replied in a manner which was to such an extent an interference in the internal politics of this country that his recall was demanded, and not being complied with at once he was dismissed within three days thereafter. It is not outside the realm of possibilities that our political situation hastened our diplomacy in that case. (Parliamentary Papers, United States, No. 4, 1888, and No. 1, 1889.)

## SECTION II. CONSULS.

**Judge-Consuls.**

Consuls are not diplomatic agents, but are primarily commercial agents, although they perform a variety of functions, depending somewhat upon the country in which they are located. In countries not yet belonging to the family of nations consuls are clothed with certain judicial powers. This jurisdiction which will presently be discussed at greater length is interesting as a remnant or survival but was at one time the whole duty of a consul. Under the old system, that of the judge-consul, this official's duty was to settle disputes between the merchants of a port and foreign merchants. At first he was selected

by the local merchants, but later on these officials were appointed by foreign states. With this change, which took place in the sixteenth century, the duties of the consul were much expanded.

For purposes of convenience, consular officers are divided into consuls-general, vice and deputy consuls-general, consuls, vice and deputy-consuls, commercial agents and consular clerks. The consuls-general and consuls are in the United States appointed by the president "by and with the advice and consent of the Senate." Commercial agents and consular clerks are appointed by the president alone. Vice and deputy officials are appointed by their chiefs, as are also the clerks of the consulate. Those appointed by the president receive a commission from the secretary of state, and, through the minister of the United States to the country to which they are sent, they receive from the secretary for foreign affairs of that state an *exequatur*, which is a letter patent signed by the sovereign or executive head and countersigned by the secretary for foreign affairs. This is his official warrant that his presence is agreeable to the state in which he is to reside. A state may refuse an *exequatur*, if for any serious reason the person commissioned as consul is personally objectionable or comes from a country whose independence it does not wish to recognize. Vice-consuls and deputy consuls are sometimes granted *exequaturs* but are frequently recognized in a less formal way.

A great many of their duties are of a sort with which international law has nothing to do, and these we need not discuss. But others are of such a nature as to give to consuls at least a quasi-international character. Though the duties of consuls of different countries differ, the following are among the duties commonly intrusted to consular officials: The issuing of passports to citizens of their own country who reside within their consular district,

giving assistance to shipwrecked and destitute seamen belonging to their own country, viséing passports, putting their O. K. upon invoices of goods shipped to their own country from their consular district, seeing that their fellow-countrymen are not punished without a fair trial, and, in certain countries, holding consular courts, reporting upon the condition of the markets and industries in their district, calling the attention of their government to any consummated or prospective changes in the revenue or other laws of the country in which they are which may affect vitally the interests of their own country, settling estates of their fellow-countrymen who die while residents of their consular districts.

**Immunities of  
consuls.**

The immunities of consuls are about the same as those of diplomatic agents. Though most writers claim that the immunities of consuls rest upon comity, it would seem that at the present time the generally recognized necessity for having such officials and the further recognition that their immunities are necessary to the due discharge of their duties are sufficient to warrant the conclusion that their immunities now rest upon law.

**Consular juris-  
diction.**

While the rapid increase in commercial intercourse has led to an increase in the importance of that phase of the duties of consuls, what is known as consular jurisdiction has decreased in importance, for the reason that the number of states in which this jurisdiction is considered necessary is gradually decreasing. But four years ago it was abolished in Japan; it has been whittled down by treaty in China; an open protectorate by Japan over Corea within the past year abolished it in that country. In Morocco, where it is still in full force, we get a chance to study it. Here the local courts have no jurisdiction over foreigners. In the language of Secretary Seward, "all Christian nations refuse to the government of Morocco any right, power or control whatever in any

circumstances over the person or property of Christians, or Franks, as they are called, residing in that Empire." (Instructions of Secretary of State Seward, to Mr. McMath, April 28, 1862.) The situation has not changed materially since Seward's time, and probably will not until some other power, most likely France, assumes responsibility for order within the empire. The system of consular jurisdiction is at best unsatisfactory and the field of its application should be narrowed as rapidly as possible; but it is not at all likely that it will be entirely abolished so long as there are countries whose administration of justice is considered by the family of nations as giving an insufficient guarantee that the lives and property of foreigners can be safely left to its protection.

A consul may at any time be recalled by his own government or his recall demanded by the government within **Recall.** whose jurisdiction he resides. With the former case, international law is not concerned as, except in rare cases, it is wholly a question between a state and its citizens, but in the latter case it is a question between states, and the state upon whom the demand is made may require that just cause be given.

A state may at any time dismiss a consul by revoking his exequatur. In 1834, the recall of the Prussian consul at Bayonne was demanded by France on the ground that he **Dismissal.** had assisted the Carlists in smuggling arms into Spain, and, upon the refusal of Prussia to act, his exequatur was withdrawn. In 1856, the United States revoked the exequatur of three British consuls on the ground that they had participated in attempts to enlist men in this country for the Crimean war. During the Civil War the United States revoked the exequatur of the British consul at Charleston for certain communications of his with the Confederacy and later it revoked the exequatur of a citizen of the United States who was representing a foreign

country as its consul at St. Louis, because he attempted to use his commission for the purpose of escaping military service. In 1866, the exequatur of the consul at Oldenburg, N. Y., was revoked for his refusal to appear and give testimony in a case in the Supreme Court to which he was a party.

**TAYLOR v. BEST.**

(14 Common Bench, 487; Snow's Cases, 90.)

**IMMUNITIES OF DIPLOMATIC AGENTS FROM LOCAL JURISDICTION.**

This was an action brought by the plaintiff against the four defendants to recover 250 pounds deposited in their hands for shares in an intended sulphate company, of which they were directors.

A writ being issued, the plaintiff's attorney wrote to the defendant Drouet, asking the name of his solicitor to whom he should send the process for an undertaking to appear,—M. Drouet instructs his attorney to write to the plaintiff's attorney, requesting that the process be sent to him. The cause came to an issue, notice of trial was given, appearance duly entered and Drouet obtained a rule for a special jury.

Two days later Drouet took out a summons on the other parties to the suit to show why all proceedings should not be stayed, or why his name should not be struck out of the proceedings on the ground that he was protected from such a suit by reason of his being a public minister, first secretary of the Belgian legation at the Court of St. James.

The defendant Drouet obtained a rule nisi.

Jervis, C. J.: "This case was very elaborately argued yesterday, and the importance of the subject induced the court to take time to look into the various authorities which were referred to. I am of opinion that the rule should be discharged. There is no doubt, that the

defendant Drouet fills the character of a public minister to which the privilege contended for is applicable: and I think it is equally clear, that, if the privilege does attach, it is not, in the case of an ambassador or public minister, forfeited by the party's engaging in trade, as it would, by virtue of the proviso in the 7 Anne, c. 12 s. 5, in the case of an ambassador's servant. If an ambassador or public minister, during his residence in this country, violates the character in which he is accredited to our court, by engaging in commercial transactions, that may raise a question between the government of this country and that of the country by which he is sent; but he does not thereby lose the general privilege which the law of nations has conferred upon persons filling that high character,—the proviso in the statute of Anne limiting the privilege in cases of trading applying only to the servants of the embassy.

“ For this, *Barbuit's Case*, *Cas. Temp. Talbot*, 281, is an authority.

“ Admitting, then, that M. Drouet is a person entitled to the privileges and immunities which the law of England accords to ambassadors from foreign friendly courts, and that he does not forfeit them by engaging in commercial ventures,—the question is whether he is, under all the circumstances disclosed by the affidavit before us, entitled to the privilege which he claims.

“ Although it is admitted that no process can be available against the person or the goods of a foreign minister, no case has been cited to show that an application in the present form, to stay all proceedings, is available in the courts of this country. On the contrary, in the case of the ambassador's servants, it appears that the practice has been, not to stay the proceedings altogether, but to discharge the party from custody, on entering a common appearance. The case of *Crosse v. Talbot*, 8 Mod. 288, recognizes that as the true principle. The motion on the part

of the defendant there was to set aside the bail bond given upon his arrest, on his filing common bail; and the rule was discharged, on the ground that the party did not bring himself strictly within the privilege allowed to the servant of an ambassador; the court holding that, to entitle him to the privilege, he ought to be a domestic servant, and really to exercise the duties of the office, and that his being a mere nominal servant is not enough. And the reporter adds: 'A great many cases have since been determined upon the same principle; but it was in these cases held, that the idea of a domestic servant was not confined to his living in a foreign minister's house, provided he was a real servant, and actually performed the service.' The course, therefore, seems to have been in these cases, not to move to stay all proceedings, but to move to set aside or cancel the bail-bond, upon the defendant's filing common bail. No case has been cited of a motion to stay the proceedings, where the personal liberty of the applicant has not been interfered with. Further, I am aware of no case in which, where there are several defendants, and the action has been allowed to go on to the verge of trial, the proceedings have been stayed upon the application of one of the defendants.

"Such a course would be obviously unjust to the other defendants, seeing that the expense they had already incurred would thereby be rendered useless. Without, however, dwelling upon that, it seems to me that this motion must fail, upon the merits.

"The action is brought against four defendants, — the writ being sued out against M. Drouet and the three others as joint-contractors. No doubt, the plaintiff was bound, at the peril of a plea in abatement, to sue all. The writ being issued, nothing is being done upon it which can at all interfere with the exercise by M. Drouet of his diplomatic functions, or with his personal comfort or dignity. But, knowing that a writ has issued, or having reason to believe



that it is about to issue, he causes his attorney to write to the plaintiff's attorney, desiring that the process may be sent to him for an undertaking to appear. He, therefore, voluntarily attorns and submits himself to the jurisdiction of the court. Under these circumstances, I think he cannot be permitted now to complain that the suit has been improperly instituted against him. On the contrary, I think, that, by analogy to the doctrine cited from the learned jurists whose works have been so laboriously consulted, the action may well be maintained.

“ It is said, — and perhaps truly said, — that an ambassador or foreign minister is privileged from suit in the courts of the country to which he is accredited, or, at all events, from being proceeded against in a manner which may ultimately result in the coercion of his person or the seizure of his personal effects necessary to his comfort and dignity; and that he cannot be compelled, *in invitum*, or against his will, to engage in any litigations in the courts of the country to which he is sent. But all the foreign jurists hold, that, if the suit can be founded without attacking the personal liberty of the ambassador, or interfering with his dignity or personal comfort, it may proceed. Various passages have been cited to show, that, in countries where the civil law prevails, and where jurisdiction can be founded by a proceeding in *rem* in the first instance, where there are houses or lands, which are immovable, that may be taken to found the jurisdiction, the suit may proceed. Movable goods, too, which are unconnected with the personal comfort and dignity of the ambassador, may be taken for the same purpose.

“ And when we consider the effect of the proceeding, and what may be done by the party sued, there seems to be no substantial distinction between the two modes; because, although it is true, that, in countries where the civil law prevails, the proceeding is in *rem*, and the means of litiga-

tion between the two parties incidentally established without any molestation or interference with the person of the defendant, yet if the defendant chooses to appear, for the purpose of protecting his goods and investigating the matter in dispute, he may convert that which was originally a proceeding in rem into a proceeding in personam. And such is commonly the course in the Scotch courts. If, therefore, as in Holland, and in some other countries, where goods may be taken for the purpose of founding jurisdiction, the defendant may come in and convert the proceeding in rem into a proceeding in personam, and so attorn or submit himself to the jurisdiction, it seems to me that there is no distinction between that case and the present, where there has been no attempt on the part of the plaintiff to disturb the comfort or interfere with the personal liberty of the foreign minister; but where there has been the mere issuing of a writ to which he has voluntarily appeared, and thus submitting himself to the jurisdiction, I do not feel myself at all pressed by the argument urged by Mr. Willes, that the privilege in question, being the privilege of the sovereign, cannot be abandoned or waived by the ambassador; for, when the authorities upon which that argument is sought to be sustained, come to be examined, they do not show that the ambassador may not submit himself to the jurisdiction for the purpose of having the matter in difference investigated and ascertained; but only that the sacred character of the person of the ambassador cannot be affected, by any act or consent on his part; and that, by interfering with the person of the ambassador, or with the goods which are essential to the personal comfort and dignity of his position, you are in effect attacking the privilege of his master.

That, however, is not the case here; for anything that appears, M. Drouet is sued, — he being a joint contractor and so a necessary party to the action, — merely for the

purpose of ascertaining the liability of the other defendants. If he had not thought it fit to attorn to the jurisdiction, but allowed judgment to go against him by default, *non constat* that anything would have been done upon the judgment, otherwise than by enforcing it against the other defendants. If any *ca. sa.* or *fi. fa.* were issued against him upon the judgment, the statute of Anne would have applied, and the court might have been called upon to interfere to prevent its being put in force against him. It seems to me that M. Drouet here has courted the jurisdiction, and that we ought not to interfere."

#### DILLON'S CASE.

(Snow's Cases, p. 99.)

#### IMMUNITIES OF CONSULS.

In 1854 Mr. Dillon, then consul of France at San Francisco, was brought into the United States District Court, then sitting, on an attachment for refusing to obey a subpoena *duces tecum* issued from that court to compel his attendance at a criminal trial then and there pending. Mr. Dillon protested against the process on two grounds: (1) Immunity from such process by international law; (2) immunity under the French-American treaty. The second point was merged in argument in the first, since it was agreed by counsel that the treaty privilege could not stand in the way of a party's constitutional right to meet the witness against him face to face, unless that privilege was in accordance with public international law.

On this question the court (Hoffman, J.,) spoke as follows:

"If the accused, by virtue of the constitutional provision in this case, can compel the attendance of the consul of France, it seems necessarily to follow the attendance of an ambassador could in like manner be enforced.

“ The immunity afforded to and personal inviolability of ambassadors, now universally recognized by the law of nations, has been deemed one of the most striking instances of the advance of civilization and the progress of enlightened and liberal ideas. Though resident in a foreign country to which they are deputed (1 Kent. Com. 45), their persons have, by the consent of all nations, been deemed inviolable; nor can they, says the same high authority, be made amenable to the civil or criminal jurisdiction of the country. By fiction of law, the ambassador is considered as if he were out of the territory of the foreign power, and, though he resides within the foreign state, he is considered a member of his own country, retaining his original domicile, and the government he represents has exclusive cognizance of his conduct and control over his person. (1 Kent’s Com. 46.)

“ Does, then, the Constitution of the United States, by the provision in favor of persons accused of crime, intend to subject these high functionaries to the process of the courts, and does it authorize and require the courts, in case of disobedience, to violate their persons and disregard immunities universally conceded to them by the law of nations, by imprisoning them? If, as is the received doctrine, the ambassador cannot, even in the case of a high crime committed by himself, be proceeded against, it is obvious that for a lesser offense of a contempt or disobedience to an order of a court, he would *a fortiori* not be amenable to the law. The only ground upon which the right of a court to compel the attendance of an ambassador by its process, and to punish him if he disobey it, can be placed, is that the Constitution is in this case in conflict with and paramount to the law of nations, and the immunity usually conceded to ambassadors is, by the provision in favor of the accused in criminal cases, taken away.

“ But the privilege of ambassadors from arrest, under

any circumstances, has been declared by congress by special legislation. By the twenty-fifth section of the act of congress of April 30th, 1790, it is enacted that; 'if any writ or process sue out of any courts of the United States, or of a particular state, or by any judge or justice therein respectively, whereby the person of an ambassador may be arrested or imprisoned, or his goods distrained, seized, or attached, such writ and process shall be deemed and adjudged to be utterly null and void to all intents, construction, and purposes whatever.' "

When the attachment was served on Mr. Dillon, he hauled down the consular flag; and the case was taken up by the French minister at Washington, as involving a gross disrespect to France. A long and animated controversy between Mr. Marcy, then Secretary of State, and the French Government ensued. The fact that an attachment had issued under which Mr. Dillon was brought into court was regarded by the French Government as not merely a contravention of the treaty, but an offense by international law; and it was agreed that the disrespect was not purged by the subsequent discharge of Mr. Dillon from arrest. It was urged, also, that the fact that the subpoena contained the clause *duces tecum* involved a violation of the consular archives. Mr. Marcy, in a letter of September 14th, 1854, to Mr. Mason, then minister at Paris, discussed these qualities at great length. He maintains that the provision in the Federal Constitution giving defendants opportunity to meet witnesses procured against them face to face, overrides conflicting treaties, unless in cases where such treaties embody exceptions to this right recognized as such when the Constitution was framed. One of these exceptions relates to the case of diplomatic representatives. "As the law of evidence stood when the Constitution went into effect," says Mr. Marcy, "ambassadors and ministers could

not be served with compulsory process to appear as witnesses, and the clause in the Constitution referred to, did not give the defendant the right in criminal prosecutions to compel their attendance in court. "This privilege, however, Mr. Marcy maintained, did not extend to consuls, and consuls, therefore, could only procure the privilege when given to them by treaty which, in criminal cases, was subject to the limitations of the Constitution of the United States. Mr. Marcy, however, finding that the French Government continued to regard the attachment, with the subpoena duces tecum, as an attack on its honor, offered, in a letter to Mr. Mason, dated January 18th, 1855, to compromise the matter by a salute to the French flag upon a French man-of-war, stopping at San Francisco. Count de Sartejes, the French minister at Washington, asked in addition that when the consular flag at San Francisco was rehoisted, it should receive a salute. This was declined by Mr. Marcy.

In August, 1855, after a long and protracted controversy, the French Government agreed to accept as a sufficient satisfaction an expression of regret by the Government of the United States, coupled with the provisions that "when a French national ship or squadron shall appear in the harbor of San Francisco the United States authorities there, military or naval, will salute the national flag borne by such ship or squadron with a national salute, at an hour to be specified and agreed on with the French naval commanding officer present, and the French ship or squadron whose flag is thus saluted will return the salute gun for gun."

In a dispatch to Mason, American minister to France, Mr. Marcy said: "The Constitution is to prevail over a treaty where the provisions of the one come in conflict with the other. It would be difficult to find a reputable lawyer in this country who would not yield a ready assent to this

proposition. Mr. Dillon's counsel admitted it in his argument for the consul's privilege before the Court in California.

“The sixth amendment to the United States Constitution gives, in general and comprehensive language, the right to a defendant in criminal prosecutions to have compulsory process to procure the attendance of witnesses in his favor. Neither Congress nor the treaty-making power are competent to put any restriction on this constitutional provision. There was, however, at the time of its adoption, some limit to the range of its operation. It did not give to such a defendant the right to have compulsory process against all persons whatever but only against such as were subject to subpoena at that time, such as might by existing law be witnesses.

“There were then persons and classes of persons who were not thus subject to that process, who by privileges and mental disqualifications, could not be made witnesses, and this constitutional provision did not confer the right on the defendant to have compulsory process against them. As the law of evidence stood when the Constitution went into effect, ambassadors and ministers could not be served with compulsory process to appear as witnesses, and the clause in the Constitution referred to did not give to the defendant in criminal prosecution the right to compel their attendance in court. But what was the case in this respect as to consuls? They had not the diplomatic privileges of ambassadors and ministers. After the adoption of the Constitution the defendant in a criminal prosecution had the right to compulsory process to bring into court as a witness in his behalf any foreign consul whatsoever.

“If he then had it, and has it now, when and how has this Constitutional right been taken from him? Congress could not take it away, neither could the treaty-making power, for it is not within the competence of either to

modify, or restrict the operation of any provision of the Constitution of the United States.”

**THE RAPID.**

(8 Cranch, 155.)

**EFFECT OF COMMENCEMENT OF WAR UPON INTERCOURSE.**

Johnson, J., delivered the opinion of the court, as follows:

This capture was made on the high seas, about a month after the declaration of war. The claimant, Harrison, had purchased a quantity of English goods in England, “a long time,” to use his own language, before the declaration of war, and deposited them on a small island called Indian Island, near to the line between Nova Scotia and these States. Upon the breaking out of the war, his agents in Boston hired *The Rapid*, a licensed vessel in the cod-fishery, to proceed to the place of deposit, and bring away these goods. On her return she was captured by *The Jefferson*, a privateer, and was condemned for trading with the enemy’s country.

On the argument, it was contended, in behalf of the appellant, that this was not a trading within the meaning of the cases cited to support the condemnation; that, on the breaking out of a war, every citizen had a right, and it was the interest of the community to permit her citizens, to withdraw property lying in an enemy’s country, and purchased before the war; finally, that neither the declaration of war, nor the commission of the privateer, authorized the capture of this vessel and cargo, as they were, in fact, American property.

It is understood that the claim of the United States for the forfeiture is not now interposed. The court, therefore, enters upon this consideration unembarrassed by a



claim which would otherwise override every question now before us.

This is the first case, since its organization, in which the court has been called upon to assert the rights of war against the property of a citizen. It is with extreme hesitation, and under a deep sense of the delicacy of the duty which we are called upon to discharge, that we proceed to adjudge the forfeiture of private right, upon principles of public law highly penal in their nature, and unfortunately too little understood.

But a new state of things has occurred — a new character has been assumed by this nation, which involves it in new relations, and confers on it new rights; which imposes a new class of obligations on our citizens, and subjects them to new penalties.

The nature and consequences of a state of war must direct us to the conclusions which we are to form on this case.

On this point there is really no difference of opinion among jurists: there can be none among those who will distinguish between what it is in itself, and what it ought to be under the influence of a benign morality and the modern practice of civilized nations.

In the state of war, nation is known to nation only by their armed exterior; each threatening the other with conquest or annihilation. The individuals who compose the belligerent States exist, as to each other, in a state of utter occlusion. If they meet, it is only in combat.

War strips man of his social nature; it demands of him the suppression of those sympathies which claim man for a brother; and accustoms the ear of humanity to hear with indifference, perhaps exultation, "that thousands have been slain."

These are not the gloomy reveries of the bookman. From the earliest time of which historians have written

or poets imagined, the victor conquered but to slay, and slew but to triumph over the body of the vanquished. Even when philosophy had done all that philosophy could do to soften the nature of man, war continued the gladiatorial combat; the vanquished bled wherever caprice pronounced her fiat. To the benign influence of the Christian religion it remained to shed a few faint rays upon the gloom of war; a feeble light, but barely sufficient to disclose its horrors. Hence, many rules have been introduced into modern warfare, at which humanity must rejoice, but which owe their existence altogether to mutual concessions and constitute so many voluntary relinquishments of the rights of war. To understand what it is in itself, and what it is under the influence of modern practice, we have but too many opportunities of comparing the habits of savage, with those of civilized warfare.

On the subject which particularly affects this case, there has been no general relaxation. The universal sense of nations has acknowledged the demoralizing effects that would result from the admission of individual intercourse. The whole nation are embarked in one common bottom, and must be reconciled to submit to one common fate. Every individual of the one nation must acknowledge every individual of the other nation as his own enemy — because the enemy of his country. It is not necessary to quote the authorities on this subject; they are numerous, explicit, respectable, and have been ably commented upon in the argument.

But, after deciding what is the duty of the citizen, the question occurs, what is the consequence of a breach of that duty?

The law of prize is part of the law of nations. In it, a hostile character is attached to trade, independently of the character of the trader who pursues or directs it. Condemnation to the use of the captor is equally the fate

of the property of the belligerent, and of the property found engaged in antineutral trade. But a citizen or ally may be engaged in a hostile trade, and thereby involve his property in the fate of those in whose cause he embarks.

This liability of the property of a citizen to condemnation as prize of war, may be likewise accounted for under other considerations. Everything that issues from a hostile country is, *prima facie*, the property of the enemy; and it is incumbent upon the claimant to support the negative of the proposition. But if the claimant be a citizen or an ally at the same time that he makes out his interest, he confesses the commission of an offense which under a well-known rule of the civil law, deprives him of his right to prosecute his claim.

This doctrine, however, does not rest upon abstract reason. It is supported by the practice of the most enlightened (perhaps we may say of all) commercial nations. And it affords us full confidence in our decision, that we find, upon recurring to the records of the court of appeals in prize cases established during the revolutionary war, that, in various cases, it was reasoned upon as the acknowledged law of that court. Certain it is that it was the law of England before the Revolution, and therefore constitutes a part of the admiralty and maritime jurisdiction conferred on this court, in pursuance of the Constitution.

After taking this general view of the principal doctrine on this subject, we will consider the points made in behalf of the claimant in this case, and, (1) Whether this was a trading, in the eye of the prize law, such as will subject the property to capture?

The force of the argument, on this point, depends upon the terms made use of. If by trading, in prize law, was meant that signification of the term which consists in negotiation or contract, this case would certainly not come

under the penalties of the rule. But the object, policy, and spirit of the rule is to cut off all communication or actual locomotive intercourse between individuals of the belligerent states. Negotiation or contract has, therefore, no necessary connection with the offense. Intercourse inconsistent with actual hostility, is the offense against which the operation of the rule is directed; and by substituting this definition for that of trading with an enemy, an answer is given to this argument.

2. Whether, on the breaking out of a war, the citizen has a right to remove to his own country with his property, is a question which we conceive does not arise in this case. This claimant certainly had not a right to leave the United States for the purpose of bringing home his property from an enemy country; much less could he claim it as a right to bring into his country goods, the importation of which was expressly prohibited. As to the claim for the vessel, it is founded on no pretext whatever; for the undertaking, besides being in violation of two laws of the United States, was altogether voluntary and inexcusable. With regard to the importations from Great Britain about this time, it is well known that the forfeiture was released on grounds of policy and a supposed obligation induced by the assurances which had been held out by the American chargé d'affaires in England. But this claimant could allege no such excuse.

3. On the third point, we are of opinion that the foregoing observations furnish a sufficient answer.

If the right to capture property thus offending, grows out of the state of war, it is enough to support the condemnation in this case, that the act of Congress should produce a state of war, and that the commission of the privateer should authorize the capture of any property that shall assume the belligerent character.

Such a character we are of opinion this vessel and cargo

took upon herself; or, at least, she is deprived of the right to prove herself otherwise.

We are aware that there may exist considerable hardship in this case; the owners, both of vessel and cargo, may have been unconscious that they were violating the duties which a state of war imposed upon them. It does not appear that they meant a daring violation either of the laws or belligerent rights of their country. But it is the unenvied province of this court to be directed by the head, and not the heart. In deciding upon principles that must define the rights and duties of the citizen and direct the future decisions of justice, no latitude is left for the exercise of feeling.

## CHAPTER V.

### PROPERTY.

#### SECTION I. TERRITORIAL PROPERTY.

**Boundaries of a state.** The territorial property of a state consists of all the land and water within its boundaries. These boundaries may be either artificial or natural, i. e., they may be arbitrary lines drawn from certain fixed points to others or they may be natural objects, as mountain ridges or rivers. The former have the advantage as regards definiteness, the latter as a means of defense. The lack of definiteness in the case of the latter has led to certain rules of interpretation.

**Mountains.** In case a mountain chain is mentioned as the boundary between states this is interpreted as meaning that the water-divide, rather than a straight line drawn from peak to peak, forms the frontier. But this rule is not always easy of application, so that in the case of our northeast boundary line it took years to reach an agreement concerning it. The matter appears easy enough to one looking at a map, but to the surveyors on the ground it is by no means easy.

**Rivers.** Where a river is named as the boundary, what is meant depends upon whether the opposite bank is occupied or unoccupied territory. If the former, the rule of interpretation now established provides that the middle of the stream shall be the boundary line. In the case of streams that are not navigable it is a line equidistant from each bank, but in the case of navigable streams it is the *thalweg*, or thread of the stream. This is clearly to enable each to navigate the stream without going into the territory of the other. If the opposite bank is unoccupied territory then the rule provides that as possession of the stream in its

entirety would be of advantage to the state possessing it and would conflict with the rights of no other state an intention to take such possession may be presumed. The burden of showing that the opposite bank was unoccupied territory rests upon the state claiming possession of the entire stream under this rule. When, however, the possession of the entire stream has been once established, whether by occupation or cession this carries with it a right to the use of the opposite bank for certain purposes. This phase of the rule has at times been pushed to ridiculous lengths. As when by the Peace of Westphalia, in 1648, the river Oder was ceded to Sweden, by the Empire, she claimed that this gave her territory to the extent of two miles from the bank as an inseparable accessory to the stream.

Where the title to the entire stream is acquired by treaty the object of the cession should be taken into account. Purposes for which stream is acquired. For if from the treaty it appeared that the stream was acquired for the sake of the fisheries this would have a bearing upon the shore rights which could reasonably be claimed. Or, as in the case of the cession of the Foron to Geneva by Sardinia in 1816, where it was clear from the treaty that the acquisition was for the purpose of putting an end to the disputes as to the rights to the use of its waters for the purpose of supplying power for mills and factories, there could be founded upon this possession of the entire stream no reasonable claim to the shore rights for other purposes.

A change in the course of the stream may or may not cause a change in the location of the boundary line. If Change in course of stream. If the change is gradual, it does; if sudden, so as to form an entirely new bed, it does not. In the former case, the boundary line may, by following the thread of the stream, move a considerable distance in one direction or the other; but in the latter case, it will be the old bed of the stream,

and hence remain in the same place. Upon this point the Attorney-General of the United States said in 1856: "When a river is the dividing limit of adjoining territories, the natural changes to which itself is liable, or which its action may produce on the face of the country, give rise to various questions, according to the physical events which occur, and the previous relation of the river to the respective territories. The most simple of all the original conditions of the inquiry is where the river appertains by convention equally to both countries, their rights being on either side of the *filum aquae*, or middle of the channel of the stream. That is the present fact.

"With such conditions, whatever changes happen to either bank of the river by accretion on the one or degradation of the other; that is, by the gradual and, as it were, insensible accession or abstraction of mere particles, the river as it runs continues to be the boundary. One country may, in process of time, lose a little of its territory, and the other gain a little, but the territorial relations cannot be reversed by such imperceptible mutations in the course of the river. The general aspect of things remains unchanged. And the convenience of allowing the river to retain its previous function, notwithstanding such insensible changes in its course, or in either of its banks, outweighs the inconveniences even to the injured party; it is a detriment, which, happening gradually, is inappreciable in the successive moments of its progression.

"But, on the other hand, if, deserting its original bed, the river forces for itself a new channel in another direction, then the nation, through whose territory the river thus breaks its way, suffers injury by the loss of territory greater than the benefit of retaining the natural river boundary, and that boundary remains in the middle of the deserted river bed. For, in truth, just as a stone pillar constitutes a boundary, not because it is a stone, but because of



the place in which it stands, so a river is made the limit of nations, not because it is running water bearing a certain geographical name, but because it is water flowing in a given channel, and within given banks, which are the real international boundary." There is little doubt but that this is still a correct statement of the law.

Whether a fringe of uninhabited islands extending for some distance from the shore should be considered as <sup>Fringes of is-</sup>lands. within the territorial boundaries of a state is hard to determine. In some cases it is sufficiently clear that they should, while in others it is, to say the least, very doubtful. The general lay of the land must be taken into consideration in order to determine intelligently, hence it is practically impossible to formulate a general rule; each case rests upon its own merits.

The matter is of greatest importance where these islands run nearly parallel to the mainland and inclose a considerable body of water. If this stretch of water is more than a marine league wide, is it a part of the territorial waters of the state? Or in other words must the boundary be considered as a marine league beyond the islands? If the stretch of water is but a few miles wide, or, if several miles wide and shallow, so that it is not navigable, it is generally conceded to be a part of the territorial waters of the state. Such fringes of islands are frequent off the coast of Florida and we have never hesitated to consider the inclosed sheets of water as a part of our territorial waters, nor has our view of the matter been questioned. Another example of this is the Archipelago de los Canarios which incloses a stretch of shallow water nearly one hundred miles in width, yet there can be little doubt but that the boundaries of Cuba are outside this fringe of islands, so that the inclosed water is in effect a Cuban lake. If upon the other hand the body of inclosed water is large and navigable and there are deep channels

between the islands so that the body of water is accessible from the ocean, as is the case with Behring Sea, the boundary line is a marine league from the mainland and not from the outer edge of the fringe of islands.

**Modes of acquiring territorial property of a state.**

Such being the territorial property of a state, what are the modes of acquiring it? These are: Occupation, conquest, cession, prescription, and accretion. That these overlap each other to some extent will be readily seen; as for instance, occupation merges into prescription, and conquest is usually swallowed up in cession; yet there is a sufficient difference between them to warrant our discussing them separately.

**Occupation.**

If territory is unoccupied, a state may by taking possession of it under circumstances which indicate an intention to continue in possession, acquire title to the property. And in international law, territory is considered as unoccupied which is not in the possession of any civilized people.

**Discovery gives merely inchoate title.**

While formerly discovery was considered as sufficient upon which to base a title to the territory discovered, it is now recognized as giving simply an inchoate title which amounts to nothing unless followed up by occupation. When we remember the disputed claims of title to the territory of what is now the United States resulting from the old rule of basing title upon mere discovery, it is not at all surprising that the conclusion shall have been reached that such a basis was altogether too vague and uncertain and hence should be discarded. The old rule that discovery of unoccupied land, or what is the same thing, land occupied by uncivilized peoples will be found in *Johnson v. McIntosh*, 8 Wheaton, 533. After reviewing the practice of European nations upon this point, the court says: "Thus all nations of Europe, who have acquired territory on this continent, have asserted in themselves, and recognized in others, the exclusive right of the dis-

coverer to appropriate lands occupied by the Indians and to convey a title to them subject only to the Indian right of occupancy." What was true of the Indians would apply to all uncivilized people. Though this was the law at the time the decision was rendered, it is not now and has not been, as to Africa, since the Conference of Berlin, 1885.

As occupation may lawfully form the basis of a state's title to territory, it becomes important for us to inquire what constitutes occupation? The possession must, in the first place, be either by persons acting under the authority of the state or if by unauthorized persons their act must be ratified by the state upon whose behalf they acted. The possession in order to amount to occupation must be reasonably permanent. Thus, if a navigator, whether commissioned by his state or not, should take possession of an uninhabited island and declare it to be the property of his sovereign and then sail away without leaving persons there to exercise control over it, this would not be sufficient to constitute occupation.

What constitutes occupation.

There is not entire agreement as to the extent of territory affected by an act of occupation. In the case of a small island, occupation of a part is sufficient to give title to the whole. It would be unreasonable to expect that every acre should be occupied or under actual control of the settlers. Upon this part of the rule there is agreement, but when we come to deal with very large islands and continents the matter is by no means so plain and we are met with differences of opinion. As occupation usually begins at the shore, it at once becomes important to determine to what extent of hinterland does such an occupation give title? Though at one time it was claimed that the territory attendant upon such occupation extended back to the opposite ocean, as in the case of the early settlements of this country, yet it is now well established that the territory attendant upon such occupation extends no further back

Extent of territory affected by occupation.

than to the water shed. And where different states have made settlements upon the coast, the dividing line between them is midway between their nearest posts. While it has been contended that the occupation of the mouth of a river gave title to all the territory drained by it, such a contention is hardly in accordance with the law at the present time. Another state may occupy the territory at the source and push its settlements down toward the mouth of the stream acquiring title as it goes until it comes to the line of effective occupation of the state which started at the mouth. Neither does occupation of one bank of a river preclude another state from occupying and thus acquiring title to the opposite bank.

**Controversies as to occupation to which U. S. has been a party.** The application of the law of occupation has given rise to some important controversies to which the United States has been a party. After acquiring Louisiana from France, in 1803, we claimed the Rio Grande as the southwest

boundary of that province, basing our claim upon the French title which passed to us by the treaty. The French title rested upon the exploration of the Mississippi by La Salle, who built a fort at the mouth of the river and another on the Bay of Espiritu Santo which is about 400 miles further west. The latter fort was however destroyed by the Indians four years later (1689) and its garrison massacred. No attempt was made by the French to rebuild, and the following year the Spanish took possession of the bay and founded settlements along it, and gradually pushed their settlements eastward to a point near the Red River. The French settlements did not extend further west than this river. The contention of the French was that their taking possession of the Bay of Espiritu Santo accompanied by the building of a fort was such occupation as to vest in them the definitive title and that any subsequent settlements in that place by Spain were merely acts of usurpation and hence could not furnish the basis of any

**As to part of Louisiana and Texas.**

valid title. That as the Rio Grande was midway between Espiritu Santo and the nearest legitimate Spanish settlement it was the lawful boundary line. Looking at it from the present, it seems that the French contention rested upon a very insecure foundation, for their occupation of Espiritu Santo was not sufficiently permanent to give title and their subsequent action indicated an abandonment of whatever temporary rights they had acquired. The title of the United States, to Texas, as the assignee of France, was therefore very shadowy, so that when by the treaty of 1819 with Spain we gave up our claim to Texas as part consideration for West Florida, we were yielding no very substantial rights.

Our claim to the Oregon Territory rested upon a much more substantial basis. The difficulty in reaching a conclusion as to the rights of the respective parties to this controversy arises from the dispute as to the facts. The United States claimed the territory upon the basis of (1) discovery and exploration of the Columbia River by Capt. Gray in 1792; (2) subsequent explorations by Lewis and Clark; (3) priority of settlement; (4) Spanish rights acquired by the treaty of 1819. The British claim rested upon (1) the exploration of the Columbia River by Capt. Vancouver, who according to their claim had discovered the river just prior to its discovery by Capt. Gray; (2) priority of settlement. The accuracy of these contentions was never finally settled and the matter was compromised by the treaty of 1846, which fixed the 49th parallel as the boundary instead of the Columbia river, which the British had insisted was the utmost limit of their concessions, and instead of 54-40', our claim to which President Polk said, in his message to Congress, rested upon "irrefragible facts and arguments."

The law of occupation has been modified and to a certain extent clarified by the Conference of Berlin, 1885.

**Rule laid down  
by Berlin Con-  
ference of 1885  
as to Africa.**

By this conference it was agreed that "any power which henceforth takes possession of a tract of land on the coasts of the African continent outside of its present possessions, or which being hitherto without such possessions shall acquire them, as well as the power which assumes a protectorate there, shall accompany the respective act with notification thereof, addressed to the other signatory powers of the present act, in order to enable them, if need be, to make good any claims of their own, and the signatory powers of the present act recognize the obligation to insure the establishment of authority in the regions occupied by them on the coasts of the African continent sufficient to protect existing rights and, as the case may be, freedom of trade and transit under the conditions agreed upon." Austria, Belgium, Denmark, France, Germany, Great Britain, Italy, The Netherlands, Portugal, Russia, Spain, Sweden, and Norway, Turkey, and the United States, are signatories to this agreement. Though this agreement applies only to the coasts of Africa, it was, nevertheless, a long step toward the fixing of a more definite rule as to occupation.

**Abandonment.**

The rule as to what constitutes an abandonment of territory once occupied has occasioned the same difficulty and is about as uncertain as that governing occupation. That territory once occupied may be abandoned is certain, but the evidence of an intent to abandon must be stronger in proportion to the effectiveness and time of occupation. If there is satisfactory evidence of an intention to return, with an apparent ability to reoccupy, the title is not lost, whether the abandonment is voluntary or involuntary. An intention to return will, for a reasonable length of time, be presumed.

**Espiritu Santo.**

The question as to what constitutes an abandonment has already been noticed with reference to Espiritu Santo, in which case the abandonment by the French, after less than

a year's occupancy, leaving no clear evidence of intent to return and in fact making no attempt to reoccupy, was fairly conclusive evidence that it was permanently abandoned and hence the title was lost.

Another good illustration of this is the case of Santa Lucia. This little island was occupied by the English in 1639, but unfortunately the entire colony was massacred the following year by the Caribs. For ten years no attempt was made by the English to recolonize the island; so that to the French who came there in 1850 it appeared to be unoccupied, and they took possession of it as unoccupied territory. They remained in peaceful and uninterrupted possession for fourteen years, when they were attacked by the English under Lord Willoughby and driven into the mountains, from which, upon his retirement three years later, they returned and were again in full and peaceful possession. Whatever became of them is not known, except that they disappeared. By the treaty of Utrecht, 1713, the island is referred to as "neutral" in the possession of the Caribs. That the English had abandoned their first occupation is sufficiently clear, nor can there be much doubt but that their second occupation was also abandoned and their title lost. At any rate, the title of the French to the island was recognized by England in the treaty of 1763, and as such recognition was not accorded under compulsion it may fairly be taken as the view of England as to the merits of the case,

The effect of temporary interruption of occupation is well illustrated by the case of Delagoa Bay which was submitted to the French government for arbitration in 1875. The territory about Delagoa Bay had been occupied by Portugal for about three hundred years, but she was for a short time during 1823 not in control of a strip of territory belonging to a rebellious tribe, during which time England leased from this tribe a strip upon which to estab-

lish a port. The arbitrator decided that the short period during which the occupying state was not in control was not an abandonment, and hence the title had never passed from Portugal. England acquiesced in the decision, notwithstanding she needed the port as an outlet and inlet to her Transvaal territory.

Decreased importance of question of occupation.

Historically the question of title by occupation has been a very important one, but for the future it can be of comparatively little practical importance, as very little territory remains unoccupied. And with reference to that which has been acquired by occupation, even though the occupation may have been imperfect, the title will have been rendered good by prescription.

Conquest.

Title by conquest rests upon force, which after a certain length of time receives the sanction of law. Conquest in the military sense is complete when the victorious army is in military occupation, *i. e.*, can, within the territory in question, compel obedience to its mandates by force. In the legal sense it requires in addition to possession resting upon force a formal annexation of the territory and an exercise of sovereignty over it for some time.

Case of the Elector of Hesse Cassel.

The case of the Elector of Hesse Cassel is the classic case upon the question of title by conquest. The principality of the Elector was seized by Napoleon and made a part of the Kingdom of Westphalia. As the Elector chose to serve in the Prussian rather than in the army of Napoleon, his possessions were confiscated as a part punishment for his treason. When he came into possession of his Electorate after the Congress of Vienna he attempted to collect money which had been due him on mortgages but which had been paid to Napoleon during the time he was in possession. The German Universities to whom the question was submitted decided that the conquest by Napoleon was complete and the confiscation legal. Title by conquest is recognized as sufficient in most countries, but not in the



United States. The Supreme Court of the United States has decided that such title is not good until confirmed by treaty. The cases upon this point will be found at the end of the chapter.

With reference to title by cession, *i. e.*, title which rests upon contract, the matter is sufficiently clear so that very little need be said. If one state cares to make an agreement with another whereby it passes to it the title to a certain strip of its territory, it seems entirely natural that it should have the right to do so. Hence when Louisiana, Florida, and Alaska were sold to the United States by France, Spain, and Russia, respectively, there was never any question but that the United States received good title. And since in a contract between states the question of adequacy of consideration does not enter, the title is equally good where the ceded territory is a gift. Most usually the cession results from defeat in war, in which case there is usually no consideration, although there may be as in the case of the Philippines. In all cases of cession the title rests upon the recognition of a transfer by the ceding state. This recognition nearly always takes the form of a treaty, though it might be by way of a proclamation by the state making the cession. In the latter case the acceptance of the territory would complete the contract. The validity of a transfer of territory by a belligerent during a war is justly open to question. For as was said by the Supreme Court of the United States in the case of *Harcourt v. Gaillard* (12 Wheaton; 523), "war is a suit prosecuted by the sword, and where the question to be decided is one of original claim to territory, grants of soil made *flagrante bello* by the party that fails can only derive validity from treaty stipulations," to which the victorious state is a party.

It may be well to call attention to the fact that cession of territory from one state to another does not affect the

tectorate. Here also the extent of the rights of the dominant state is by no means a fixed quantity. There is always the claim of a negative right to keep other states from doing certain things within the sphere, but no positive right of internal control. The dominant state assumes no legal responsibility for the maintenance of order or administration of justice within the sphere. The main difference between this and a protectorate is, then, the degree of responsibility of the dominant state in return for its title. In the case of the protectorate this responsibility is legal as well as moral, while in the case of the sphere of influence it is wholly moral.

**Servitudes.**

The territorial property of a state is subject to certain burdens, which, following the terminology of the Roman Law, are called servitudes, such as the right of other states to peaceably use its territorial waters for purposes of innocent trade. Viewed from the standpoint of its origin this is a customary servitude. It is very doubtful if there are at present any other customary servitudes, although formerly there were those with respect to forests and, under certain circumstances, the passage of troops. Servitudes may also arise from contract. As, for instance, a state may bind itself by treaty not to fortify certain parts of its territory; not to keep warships, or not more than a certain number, in a given place. Contractual servitudes are negative in their nature, whereas customary servitudes are positive.

**SECTION II. NON-TERRITORIAL PROPERTY OF A STATE.**

The non-territorial property of a state may consist in: (1) public vessels; (2) private vessels carrying the national flag; (3) goods owned by its citizens but embarked in foreign ships.

With reference to the first class, whether upon the high

seas or in a foreign port, the jurisdiction of the state which possesses them is not impaired or subordinated to that of any other state. To such an extent is this true as to give rise to the fiction that they are a part of the soil of the state to which they belong. Such being its immunities it is important to determine what constitutes a public vessel. Upon this point the commission of the commander is conclusive. If according to this the vessel appears to be employed for public purposes even though such employment may not be permanent, she is a public vessel. Hence, not only warships, but dispatch boats, store ships, transports, ships carrying wireless telegraphic apparatus, when commissioned to act for the state, are public vessels.

Public Vessels.

What constitutes a public vessel.

It may be well to note that though the immunity of public vessels is now thoroughly established, such has been the case only within the last century. As late as 1794, Attorney-General Bradford gave it as his opinion that "the laws of nations invest the commander of a foreign ship of war with no exemption from the jurisdiction of the country into which she comes." And nearly thirty years later, 1820, when asked by his government as to whether or not John Brown, a British subject, who had escaped from a Spanish prison and taken refuge on a British man-of-war, ought to be given up at the demand of the Spanish authorities, Lord Stowell decided that the captain had no right to disregard the demand of the Spanish authorities and said further: "I am led to think that the Spaniards would not have been chargeable with illegal violence, if they had thought proper to employ force in taking his person out of the vessel." But with the decision of the United States Supreme Court in the case of the *Exchange v. M'Faddon*, in 1812, the present rule was set forth in such a convincing way by Justice Marshall that it soon became firmly established. The opinion in the case will be found at the close of this chapter.

Immunities of public vessels.

**Purpose of immunities.**

These immunities must, however, be used in a reasonable way and for the purposes for which they were reasonably intended. If, then, the public vessel makes use of them for the purpose of violating the health regulations, revenue, or neutrality laws of the state within which it chances to be, she thereby forfeits her privileges and immunities and in extreme cases may be seized. For, as Sir James Stephen says in his *History of Criminal Law*, Vol. II, p. 49: "The essence of the privilege of ships of war in foreign territorial waters is that the commanding officer is permitted to exercise freely, and without interference on board his ship, the authority which, by the laws of his own country, he has over the ship's company." Public vessels must not be made a place of refuge for criminals, but at present the proper means of redress is through diplomatic appeal and not by invasion of the ship, as suggested by Lord Stowell, in 1820.

**Crew not entitled to immunity when separated from ship.**

As soon as officers or crew go on shore they lose their title to immunity and become subject to the local jurisdiction. The privilege attaches only to crew and vessel combined; so that if for any reason a public vessel were to lose its crew in mid-ocean it would at the same time lose its right of extraterritoriality.

**Merchant vessels.**

Merchant vessels are on a different footing than are public vessels. While both are subject to the jurisdiction of their own state alone when on the high seas, merchant vessels are subject to the local jurisdiction when in a foreign port. The nationality of a private vessel is generally evidenced by the flag it flies, but this is not conclusive. In order to be entitled to carry the flag of a country, a private vessel must satisfy certain conditions as to construction, ownership and composition of the crew. The right of a merchant ship to carry a given flag is evidenced by its papers and in case of reasonable suspicion these may be examined, without violation of international law. Though a ship's

papers are conclusive as against it, they are not conclusive as against others, who may, if they choose, have recourse to other facts in order to establish the nationality of the vessel.

With reference to goods owned by citizens of a state, but embarked in foreign ships, very little need be said. <sup>Goods embarked on foreign ships.</sup> The only chance for dispute arises where the owners of the goods become "so intimately associated with a foreign state that the national character of property belonging to them may be affected by such association." The existence of such a condition is a question for the courts.

AMERICAN INSURANCE CO. v. CANTER.

(1 Pet. 511.)

POWER TO ACQUIRE TERRITORY.

The constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty.

The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory, it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same act which transfers their country, transfers the allegiance of those who remain

in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals, remains in force until altered by the newly created power of the state.

On the 2d of February, 1819, Spain ceded Florida to the United States. The 6th article of the treaty of cession contains the following provision: "The inhabitants of the territories which his Catholic majesty ceded to the United States by this treaty, shall be incorporated in the Union of the United States, as soon as may be consistent with the principles of the Federal constitution, and admitted to the enjoyment of the privileges, rights, and immunities of the citizens of the United States.

This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States. It is unnecessary to inquire whether this is not their condition, independent of stipulation. They do not, however, participate in political power; they do not share in the government till Florida shall become a state. In the mean time, Florida continues to be a territory of the United States, governed by virtue of that clause in the constitution which empowers Congress "to make all needful rules and regulations respecting the territory or other property belonging to the United States.

Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result necessarily from the fact that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned.

## CASE OF JOHN BROWN.

(Halleck's International Law, Vol. I., p. 185.)

## RIGHT OF ASYLUM ON WARSHIPS.

In 1820, John Brown, a British subject, escaped from a Spanish prison and took refuge on H. M. S. Tyne. He was taken to England and set at liberty. But the admiralty requested the opinion of Sir William Scott as to what should have been done. He replied as follows: "Sir, I have to acknowledge the receipt of your letter dated the 25th ult., enclosing copies of a letter, and its enclosures from Captain Falcon, of H. M. S. 'Tyne,' and of the case and opinion of the King's Advocate, relative to Mr. John Brown, a native of Ireland, who, being a prisoner, in the hands of the Spaniards, effected his escape and came on board the 'Tyne' at Callao, and has since arrived on board the same within the realm of England (having claimed the protection of the flag), and acquainting me that their Lordships conceiving that they had no authority to detain him, and being supported in that opinion by the concurrence of the King's Advocate, had allowed him to depart without restraint. Upon this statement I have no observation to make, not being desired by their lordships to make any; but if my opinion had been required, it would have coincided with what has been advised and done. A more extensive and important question is proposed to me, viz.: 'Whether any British subject coming on board any of H. M.'s ships of war, in a foreign port and from the judicature of the state within whose territory such port may be situated, is entitled to the protection of the British flag, and to be deemed as within the Kingdom of Great Britain and Ireland?' Upon this question proposed generally I feel no hesitation in declaring that I know of no such right of protection belonging to the British flag,

and that I think such a pretension is unfounded in point of principle, is injurious to the rights of other countries, and is inconsistent with those of our own. The rights of territories are local and are fixed by known and determined limits. Ships are mere movables and are treated as such in the general purchase of nations. It is true that armed neutralities have attempted to give them a territorial character, but the attempt when made has been always most perseveringly, and at all hazards, resisted and defeated by the arms of our country, as inconsistent with the rights of hostility and capture. No such character is allowed to protect ships of war, when offending against the laws of neutrality upon the high seas, where no local authority whatever exists; still less can it be claimed where there is a visible and acknowledged authority, belonging to an independent state in amity with the nation of which the ships of war belong. Such a claim can lead to nothing but to the confusion and hostility which wait upon conflicting rights. The common convenience of nations has for certain reasons, and to a certain extent, established in favor of foreign ships of war, that they themselves shall not be liable to the civil process of the country in whose ports they are lying, though even this immunity has been occasionally questioned. But that individuals, merely belonging to the same country with the ships of war, are exempt from the civil and criminal process of the country in its ordinary administration of justice by getting on board such ship, and claiming what is called the protection of the flag, is a pretension which, however heard of in practice occasionally, has no existence whatever in principle. If the British flag converts a man-of-war into a British territory, the flag of other nations must be allowed to possess the same property in their marine; for there is no principle whatever that can be appropriated exclusively to the British flag.



“ It therefore must be allowed reciprocally that a Spaniard getting on board a Spanish ship of war lying in Portsmouth harbor shall be protected from British justice. I believe the administration of that justice would return a very speedy and decisive negative to any such pretension on behalf of Spaniards charged with being amenable to British law.

“ But the inconvenient effects of considering such a ship a Spanish territory would go much further—to the extent of protecting a British criminal who found his way into her. For no process of British justice can be executed on a British subject in a foreign territory. When I give this as my decided persuasion upon this subject generally, I do not mean to say that in the infinite possibility of events cases may not arise in which such a protection might be indulged.

“ But such cases are justified only by their own peculiar and extraordinary circumstances, which extend no further than to those immediate cases themselves, and furnish no rule of general practice in such as are ordinary. How far the case of Mr. Brown comes within such a description I am not enabled to state confidently by any exact knowledge of the facts, and particularly of the nature and validity of that authority under which the acts charged upon him by the Spaniards are said to have been committed. It would be improper in me to define what the British Government had not thought proper to define. Holding the opinion that before any Act of Parliament or proclamation issued, it was unlawful for a British subject to accept a hostile commission from any persons either in war or rebellion against a state in amity with the Crown of Great Britain, I am led to think that the Spaniards would not have been chargeable with illegal violence if they had thought proper to employ force in taking this person out of the vessel (British), and I add that it was

certainly very undesirable to furnish occasions for the lawful use of force in the intercourse of friendly nations. Taking the authority under which Brown acted to be clearly invalid (which I do not mean to assert), I think it might possibly appear that Captain Falcon's conduct was more to be commended for its humanity and spirit than for its strict legality.

—William Scott, Grafton Street, 28th November, 1820."

**SCHOONER EXCHANGE v. M'FADDON.**

(7 Cranch, 116.)

**WHAT IS A PUBLIC VESSEL AND WHAT ARE ITS IMMUNITIES?**

The case was this: on the 24th of August, 1811, John M'Faddon and William Greetham, of the State of Maryland, filed their libel in the district court of the United States, for the district of Pennsylvania, against the schooner Exchange, setting forth that they were her sole owners, on the 27th day of October, 1809, when she sailed from Baltimore, bound to St. Sebastians, in Spain. That while lawfully and peaceably pursuing her voyage, she was, on the 30th of December, 1810, violently and forcibly taken by certain persons, acting under the decrees and orders of Napoleon, Emperor of the French, out of the custody of the libellants, and of their captain and agent, and was disposed of by those persons, or some of them, in violation of the rights of the libellants, and of the law of nations in that behalf. That she had been brought into the port of Philadelphia, and was then in the jurisdiction of that court, in possession of a certain Dennis M. Begon, her reputed captain or master. That no sentence or decree of condemnation has been pronounced against her, by any court of competent jurisdiction; but that the property of the libellants in her remained unchanged and

in full force. They therefore prayed the usual process of the court, to attach the vessel, and that she might be restored to them.

Upon this libel the usual process was issued, returnable on the 30th of August, 1811, which was executed and returned accordingly, but no person appeared to claim the vessel in opposition to the libellants. On the 6th of September, the usual proclamation was made for all persons to appear and show cause why the vessel should not be restored to her former owners, but no person appeared.

On the 13th of September, a like proclamation was made, but no appearance was entered.

On the 20th of September, Mr. Dallas, the attorney of the United States, for the district of Pennsylvania, appeared, and (at the instance of the executive department of the government of the United States, as it is understood,) filed a suggestion, to the following effect:

Protesting that he does not know, and does not admit the truth of the allegations contained in the libel, he suggests and gives the court to understand and be informed,

That inasmuch as there exists between the United States of America, and Napoleon, Emperor of France, and King of Italy, etc., etc., a state of peace and amity; the public vessels of his said imperial and royal majesty, conforming to the law of nations, and laws of the said United States, may freely enter the ports and harbors of the said United States, and at pleasure depart therefrom without seizure, arrest, detention, or molestation. That a certain public vessel described, and known as the Balaou, or vessel No. 5, belonging to his said imperial and royal majesty, and actually employed in his service, under the command of the Sieur Begon, upon a voyage from Europe to the Indies, having encountered great stress of weather upon the high seas, was compelled to enter the port of Philadelphia, for refreshment and repairs, about the 22nd of July, 1811.

That having entered the said port from necessity, and not voluntarily, having procured the requisite refreshments and repairs, and having conformed in all things to the laws of nations, and the law of the United States, was about to depart from the said port of Philadelphia, and resume her voyage in the service of his said imperial and royal majesty, when on the 24th of August, 1811, she was seized, arrested, and detained, in pursuance of the process of attachment issued upon the prayer of the libellants. That the said public vessel had not, at any time, been violently and forcibly taken or captured from the libellants, their captain and agent, on the high seas, as prize of war, or otherwise; but that if the said vessel, belonging to the said imperial and royal majesty as aforesaid, ever was a vessel navigating under the flag of the United States, and possessed by the libellants, citizens thereof, as in their libel is alleged (which, nevertheless, the said attorney does not admit), the property of the libellants in the said vessel was seized and divested, and the same became vested in his imperial and royal majesty, within a port of his empire, or of a country occupied by his arms, out of the jurisdiction of the United States, and of any particular State of the United States, according to the decrees and laws of France, in such case provided. And the said attorney submitting, whether, in consideration of the premises, the court will take cognizance of the cause, respectfully prays, that the court will be pleased to order, and decree, that the process of attachment, heretofore issued, be quashed; that the libel be dismissed with costs; and that the said public vessel, her tackle, etc., belonging to the said imperial and royal majesty, be released, etc. And the said attorney brings here into court the original commission of the said *Sieur Begon*, etc.

On the 17th of September, 1811, the libellants filed their answer to the suggestion of the district attorney, to which

they except, because it does not appear to be made for, or on behalf, or at the instance of the United States, or any other body politic or person.

They aver, that the schooner is not a public vessel, belonging to his imperial and royal majesty, but is the property of the libellants. They deny that she was compelled by stress of weather to enter the port of Philadelphia, or that she came otherwise than voluntarily; and that the property of the libellants in the vessel never was divested, or vested in his imperial and royal majesty, within a port of his empire, or of a country occupied by his arms.

The district attorney produced the affidavits of the *Sieur Begon*, and the French consul, verifying the commission of the captain, and stating the fact that the public vessels of the emperor of France never carry with them any other document or evidence that they belong to him, than his flag, the commission, and the possession of his officers.

In the commission, it was stated that the vessel was armed at Bayonne.

On the 4th of October, 1811, the district judge dismissed the libel with costs, upon the ground that a public armed vessel of a foreign sovereign, in amity with our government, is not subject to the ordinary judicial tribunals of the country, so far as regards the question of title, by which such sovereign claims to hold the vessel.

From this sentence, the libellants appealed to the circuit court, where it was reversed, on the 28th of October, 1811.

From this sentence of reversal, the district attorney appealed to this court.

Marshall, C. J., delivered the opinion of the court as follows:—

This case involves the very delicate and important inquiry, whether an American citizen can assert, in an

American court, a title to an armed national vessel, found within the waters of the United States.

The question has been considered with an earnest solicitude that the decision may conform to those principles of national and municipal law by which it ought to be regulated.

In exploring an unbeaten path, with few, if any, aids from precedents or written law, the court has found it necessary to rely much on general principles, and on a train of reasoning, founded on cases in some degree analogous to this.

The jurisdiction of courts is a branch of that which is possessed by the nations as an independent sovereign power.

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitations not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.

All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but if understood, not less obligatory,

The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar cir-

cumstances, of that absolute and complete jurisdiction within its respective territories which sovereignty confers.

This consent may, in some instances, be tested by common usage, and by common opinion, growing out of that usage.

A nation would justly be considered as violating faith, although that faith might not be expressly plighted, which would suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.

This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extraterritorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an intercourse of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete territorial jurisdiction, which has been stated to be the attribute of every nation.

1st. One of these is admitted to be the exemption of the person of the sovereign from arrest or detention within a foreign territory.

If he enters that territory with the knowledge and license of its sovereign, that license, although containing no stipu-

lation exempting his person from arrest, is universally understood to imply such stipulation.

Why has the whole civilized world concurred in this construction? The answer cannot be mistaken. A foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity, and the dignity of his nation, and it is to avoid this subjection that the license has been obtained. The character to whom it is given, and the object for which it is granted, equally require that it should be construed to impart full security to the person who has obtained it. This security, however, need not be expressed; it is implied from the circumstances of the case.

Should one sovereign enter the territory of another, without the consent of that other, expressed or implied, it would present a question which does not appear to be perfectly settled, a decision of which is not necessary to any conclusion to which the court may come in the cause under consideration. If he did not thereby expose himself to the territorial jurisdiction of the sovereign, whose dominions he had entered, it would seem to be because all sovereigns impliedly engage not to avail themselves of a power over their equal, which a romantic confidence in their magnanimity has placed in their hands.

2nd. A second case, standing on the same principles with the first, is the immunity which all civilized nations allow to foreign ministers.

Whatever may be the principle on which this immunity is established, whether we consider him in the place of the sovereign he represents, or by a political fiction suppose him to be extraterritorial, and, therefore, in point of law, not within the jurisdiction of the sovereign at whose court he resides, still the immunity itself is granted by the governing power of the nation to which the minister is deputed. This fiction of extraterritoriality could not be



erected and supported against the will of the sovereign of the territory. He is supposed to assent to it.

This consent is not expressed. It is true that in some countries and in this among others, a special law is enacted for the case. But the law obviously proceeds on the idea of prescribing the punishment of an act previously unlawful, not of granting to a foreign minister a privilege which he would not otherwise possess.

The assent of the sovereign to the very important and extensive exemption from territorial jurisdiction, which is admitted to attach to foreign ministers, is implied from the consideration that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to fulfill the objects of his mission. A sovereign committing the interests of his nation with a foreign power, to the care of a person whom he has selected for that purpose, cannot intend to subject his minister in any degree to that power; and, therefore, a consent to receive him, implies a consent that he shall possess those privileges which his principal intended he should retain, — privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform.

In what case a minister, by infracting the laws of the country in which he resides, may subject himself to other punishments than will be inflicted by his own sovereign, is an inquiry foreign to the present purpose. If his crimes be such as to render him amenable to the local jurisdiction, it must be because they forfeit the privileges annexed to his character; and the minister, by violating the conditions under which he was received as the representative of a foreign sovereign, has surrendered his immunities granted on those conditions; or, according to the true meaning of the original assent, has ceased to be entitled to them.

3rd. A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, where he allows the troops of a foreign prince to pass through his dominions.

In such case, without any express declaration waiving jurisdiction over the army to which the right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted, would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of a free passage, therefore, implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require.

But if, without such express permit, an army should be led through the territories of a foreign prince, might the jurisdiction of the territory be rightfully exercised over the individuals composing the army?

Without doubt, a military force can never gain immunities of any other description than those which war gives, by entering a foreign territory against the will of its sovereign. But if his consent, instead of being expressed, by a particular license, be expressed by a general declaration that foreign troops may pass through a specified tract of country, a distinction between such general permit and a particular license is not perceived. It would seem reasonable that every immunity which would be conferred by a special license, would be in like manner conferred by such general permit.

We have seen that a license to pass through a territory implies immunities not expressed, and it is material to inquire why the license itself may not be presumed?

It is obvious that the passage of an army through a foreign territory will probably be at all times inconvenient and injurious, and would often be imminently dangerous to the sovereign through whose dominion it passed. Such a practice would break down some of the most decisive distinctions between peace and war, and would reduce a nation to the necessity of resisting by war, an act not absolutely hostile in its character, or of exposing itself to the stratagems and frauds of a power whose integrity might be doubted, and who might enter the country under deceitful pretexts. It is for reasons like these that the general license to foreigners to enter the dominions of a friendly power, is never understood to extend to a military force; and an army marching into the dominions of another sovereign, may justly be considered as committing an act of hostility; and, if not opposed by force, acquire no privilege by its irregular and improper conduct. It may, however, well be questioned whether any other than the sovereign power of the state be capable of deciding that such military commander is without license.

But the rule which is applicable to armies, does not appear to be equally applicable to ships of war entering the ports of a friendly power. The injury inseparable from the march of an army through an inhabited country, and the dangers often, indeed generally, attending it, do not ensue from admitting a ship of war, without special license, into a friendly port. A different rule therefore, with respect to this military force, has been generally adopted. If, for reasons of state, the ports of a nation generally, or any particular ports, be closed against vessels of war generally, or the vessels of any particular nation, notice is usually given

of such determination. If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, and they are supposed to enter such ports, and to remain in them while allowed to remain, under the protection of the government of the place.

In almost every instance, the treaties between civilized nations contain a stipulation to this effect in favor of vessels driven in by stress of weather or other urgent necessity. In such cases, the sovereign is bound by compact to authorize foreign vessels to enter his ports. The treaty binds him to allow vessels in distress to find refuge and asylum in his ports, and this is license which he is not at liberty to retract. It would be difficult to assign a reason for withholding from a license, thus granted, any immunity from local jurisdiction which would be implied in a special license.

If there be no treaty applicable to the case, and the sovereign, from motives deemed adequate by himself, permits his ports to remain open to the public ships of foreign friendly powers, the conclusion seems irresistible, that they enter by his assent. And if they enter by his assent necessarily implied, no just reason is perceived by the court for distinguishing their case from that of vessels which enter by express assent.

In all the cases of exemption which have been reviewed, much has been implied, but the obligation of what was implied has been found equal to the obligation of that which was expressed. Are there reasons for denying the application of this principle to ships of war?

In this part of the subject a difficulty is to be encountered, the seriousness of which is acknowledged, but which the court will not attempt to evade.

Those treaties which provide for the admission and safe departure of the public vessels entering a port from stress

of weather, or other urgent cause, provide in like manner for the private vessels of the nation; and where public vessels enter a port under the general license which is implied merely from the absence of a prohibition, they are, it may be urged, in the same condition with merchant vessels entering the same port for the purpose of trade who cannot thereby claim any exemption from the jurisdiction of the country. It may be contended, certainly with much plausibility if not correctness, that the same rule and the same principle are applicable to public and private ships; and since it is admitted that private ships entering without special license become subject to the local jurisdiction, it is demanded on what authority an exemption is made in favor of ships of war.

It is by no means conceded that a private vessel, really availing herself of an asylum by treaty, and not attempting to trade, would be amenable to the local jurisdiction, unless she committed some act forfeiting the protection she claims under compact. On the contrary, motives may be assigned for stipulating and according immunities to vessels in cases of distress, which would not be demanded for or allowed to those which enter voluntarily and for ordinary purposes. On this part of the subject, however, the court does not mean to indicate any opinion. The case itself may possibly occur, and ought not to be prejudged.

Without deciding how far such stipulations in favor of distressed vessels, as are usual in treaties, may exempt private ships from the jurisdiction of the place, it may safely be asserted, that the whole reasoning upon which such exemption has been implied in other cases, applied with full force to the exemption of ships of war in this.

“It is impossible to conceive,” says Vattel, “that a prince who sends an ambassador or any other minister can have any intention of subjecting him to the authority of a foreign power; and this consideration furnishes an addi-

tional argument, which completely establishes the independency of a public minister. If it cannot be reasonably presumed that this sovereign means to subject him to the authority of the prince to whom he is sent, the latter, in receiving the minister, consents to admit him on the footing of independency, and thus there exists between the two princes a tacit convention, which gives a new force to the natural obligation."

Equally impossible is it to conceive, whatever may be the construction as to private ships, that a prince who stipulates a passage for his troops, or an asylum for his ships of war in distress, should mean to subject his army or his navy to the jurisdiction of a foreign sovereign. And if this cannot be presumed, the sovereign of a port must be considered as having conceded the privilege to the extent in which it must have been understood, to be asked.

To the court it appears, that where, without treaty, the ports of a nation are open to the private and public ships of a friendly power, whose subjects have also liberty without special license, to enter the country for business or amusement, a clear distinction is to be drawn between the rights accorded to private individuals or private trading vessels, and those accorded to public armed ships which constitute a part of the military force of the nation.

The preceding reasoning has maintained the proposition that all exemptions from territorial jurisdiction must be derived from the consent of the sovereign of the territory; that this consent may be implied or expressed; and that when implied, its extent must be regulated by the nature of the case, and the views under which the parties requiring and conceding it must be supposed to act.

When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purpose of trade, it would

be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries are not employed by him, nor are they engaged in national pursuits. Consequently, there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter, can never be construed to grant such exemption.

But in all respects different is the situation of a public armed ship. She constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting his power and his dignity. The implied license, therefore, under which such vessel enters a friendly port, may reasonably be construed, and it seems to the court ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rights of hospitality.

Upon these principles, by the unanimous consent of nations, a foreigner is amenable to the laws of the place; but certainly in practice, nations have not yet asserted their jurisdiction over the public armed ships of a foreign sovereign entering a port open for their reception.

Bynkershoek, a jurist of great reputation, has indeed maintained that the property of a foreign sovereign is not distinguishable by any legal exemption from the property of

an ordinary individual, and has quoted several cases in which courts have exercised jurisdiction over causes in which a foreign sovereign was made a party defendant.

Without indicating any opinion on this question, it may safely be affirmed, that there is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation.

A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual; but this he cannot be presumed to do with respect to any portion of that armed force which upholds his crown, and the nation he is intrusted to govern.

The only applicable case cited by Bynkershoek, is that of the Spanish ships of war seized in Flushing, for a debt due from the King of Spain. In that case, the states-general interposed; and there is reason to believe, from the manner in which the transaction is stated, that, either by the interference of government, or the decision of the court, the vessels were released.

This case of the Spanish vessels is, it is believed, the only case furnished by the history of the world, of an attempt made by an individual to assert a claim against a foreign prince, by seizing the armed vessels of the nation. That this proceeding was at once arrested by the government, in a nation which appears to have asserted the power of proceeding in the same manner against the private property of the prince, would seem to furnish no feeble argument in support of the universality of the opinion in favor of the exemption claimed for ships of war. The



distinction made in our own laws between public and private ships would appear to proceed from the same opinion.

It seems then to the court, to be a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction.

Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise. Those general statutory provisions therefore which are descriptive of the ordinary jurisdiction of the judicial tribunals, which give an individual whose property has been wrested from him, a right to claim that property in the courts of the country in which it is found, ought not, in the opinion of this court, to be so construed as to give them jurisdiction in a case, in which the sovereign power has impliedly consented to waive its jurisdiction.

The arguments in favor of this opinion which have been drawn from the general inability of the judicial power to enforce its decisions in cases of this description, from the consideration that the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign, that the questions to which such wrongs give birth are rather questions of policy than of law, that they are for diplomatic rather than legal discussion, are of great weight, and merit serious attention. But the argument has already been drawn to a length which forbids a particular examination of these points.

The principles which have been stated, will now be applied to the case at the bar.

In the present state of the evidence and proceedings, The Exchange must be considered as a vessel, which was the property of the libellants, whose claim is repelled by the fact that she is now a national armed vessel, commissioned by, and in the service of the emperor of France. The evidence of this fact is not controverted. But it is contended that it constitutes no bar to an inquiry into the validity of the title, by which the emperor holds this vessel. Every person, it is alleged, who is entitled to property brought within the jurisdiction of our courts, has a right to assert his title in those courts, unless there be some law taking his case out of the general rule. It is therefore said to be the right, and if it be the right, it is the duty of the court, to inquire whether this title has been extinguished by an act, the validity of which is recognized by national or municipal law.

If the preceding reasoning be correct, The Exchange being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that, while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country.

If this opinion be correct, there seems to be a necessity for admitting that the fact might be disclosed to the court by the suggestion of the attorney for the United States.

I am directed to deliver it, as the opinion of the court, that the sentence of the circuit court, reversing the sentence of the district court, in the case of The Exchange, be

reversed, and that of the district court, dismissing the libel, be affirmed.

UNITED STATES *v.* MORENO.

(1 Wallace, 400.)

CESSION FROM ONE STATE TO ANOTHER DOES NOT AFFECT  
TITLES TO PRIVATE PROPERTY.

On an appeal from the decree of the District Court of the United States for the Southern District of California, the record disclosed the following facts: On the 5th of April, 1845, Moreno submitted to Pio Pico, then Governor of the Department of California, a petition, wherein he set forth that he had "denounced in due form, a square league of land situate between Temecula and the Lagoon called Santa Rosa, to which, after previous judicial investigation," he prayed "to be awarded the respective title, on the ground that it is absolutely vacant and without any availableness." The governor ordered the petition "to be sent for the report of" the proper officer. The officer reported that the land was "in an entire vacant state." The governor thereupon ordered the petition to be returned to Moreno, that he might annex a plat of the land, — the application to come again before the government. Moreno was authorized to occupy the land "provisionally," and it was added, "meanwhile the mentioned title-deed is being made out."

The governor ordered "the title-deed to be issued and given to the interested party with obligation to amend the plat." On the day last mentioned, a deed was issued, subject to the approval of the Department Assembly. It purported to be subscribed by the governor and secretary, but there were no subscribing witnesses to it. It contained with others the following clauses:

"The land donated to him is the same as exhibited in

the plat attached to this expediente, and borders on land of Temecula, on the Lagoon, and on Santa Margarita.

“ The judge who shall possess him of it will cause it to be measured conformable to ordinance, and give notice to the government of the number of leagues (sitios de ganado mayor) it may contain.

“ Consequently, I order that this title-deed, being held firm and valid, it be entered in the respective book and delivered to the interested party for his security and other purposes.”

The subject was submitted to the Department Assembly, and on the 3d June, 1846, the body approved and confirmed the grant.

It appeared by the testimony of one Foster, in early life a justice of the peace, but who had been for many years a “ranchero” in California, that “Santa Rosa” was the name given to a well-known tract; that it adjoined another well-known tract, called “Temecula,” on the east, a second, known as “Santa Margarita,” on the west, and that a third, called “La Laguna,” stood off in a direction northeasterly. This was confirmed by two other witnesses.

Moreno resided upon and cultivated the land from the time he was authorized to occupy it until the acquisition of the country by the United States.

After the acquisition he presented a petition to the Board of Commissioners, established by the act of Congress of 3d March, 1851, to ascertain and settle private land claims in California, to have his title confirmed, pursuant to the provisions of that statute. The commissioners having confirmed it, an appeal was taken by the United States to the District Court; and that court having affirmed the report of the commissioners, the United States brought the case here by appeal.

It was objected on behalf of the United States to the decree of the District Court:

1. That the "grant is proved, by secondary evidence of handwriting, without the legal basis for its introduction having first been laid;" this objection being made in the case, however, in this court only.

2. That the location and quantity of the land are entirely uncertain both in the grant and in the diseno.

Mr. Justice Swayne delivered the opinion of the court:

The first objection refers to the proof of the signatures of the governor and secretary to the deed to Moreno, which was made by persons acquainted with their handwriting, without those officers being called or their absence accounted for.

There are no subscribing witnesses to the deed. It was therefore allowable, according to the common law, to prove the signatures by any one acquainted with their handwriting. Such evidence was as competent and valid as the testimony of the writers themselves. It is in no sense secondary evidence. Were the rule otherwise, it is a sufficient answer to the objection, that it does not appear that the evidence was objected when it was offered and received in the court below. If no objection be made, the existence and contents of a record may be proved by parol evidence, and a court of errors will not for that reason reverse the judgment. The testimony is found in the record, without any exception, and must have its legitimate effect. In this class of cases, where the documentary proof of title is plenary, and no suspicion is raised as to its genuineness, it is the settled rule of this court to regard such evidence as both competent and sufficient. We have no doubt of the genuineness of all the papers composing this expediente. No question was made upon the subject in the court below.

It is further objected to the decree that "the location and quantity of the land are entirely uncertain, both in the grant and the diseno."

The tract is described in the titulo as known by the name of Santa Rosa, and as bounding upon Temecula, the Lagoon, and Santa Margarita. The petitioner asked for a title to all the vacant land in that locality, and it was conceded to him accordingly.

It is proved by the testimony of three witnesses that Santa Rosa was a well-known rancho; that Temecula, the Lagoon, and San Margarita were well-known contiguous ranchos, and that there was not the least difficulty either in identifying Santa Rosa, or in ascertaining its boundaries. There is no contradictory evidence upon the subject. The District Court held the evidence to be sufficient, and we concur in that opinion.

The record presents every link in the chain of a perfect expediente. There is a petition with a diseno, an order of reference, an informe by the proper officer, a decree of concession, a titulo, and the approval of the Department Assembly.

The Surveyor-General of California certifies that the expediente is copied from the archives in his possession. It is not necessary to the validity of the title that the land should have been surveyed and the quantity ascertained.

California belonged to Spain by the rights of discovery and conquest. The government of that country established regulations for transfers of the public domain to individuals. When the sovereignty of Spain was displaced by the revolutionary action of Mexico, the new government established regulations upon the same subject. These two sovereignties are the spring heads of all the land titles in California, existing at the time of the cession of that country to the United States by the treaty of Guadalupe Hidalgo. That cession did not impair the rights of private

property. They were consecrated by the law of nations, and protected by the treaty. The treaty stipulation was but a formal recognition of the pre-existing sanction in the law of nations. The act of March 3d, 1851, was passed to assure to the inhabitants of the ceded territory the benefit of the rights of property thus secured to them. It recognizes alike legal and equitable rights, and should be administered in a large and liberal spirit. A right of any validity before the cession was equally valid afterwards, and while it is the duty of the court in the cases which may come before it to guard carefully against claims originating in fraud, it is equally their duty to see that no rightful claim is rejected. No nation can have any higher interest than the right administration of justice.

## CHAPTER VI.

### CONTRACTS.

**Form of.**

Though the great majority of contracts between individuals are oral, practically all of the contracts between states are written. The usual form of contract between states is a treaty. Though, as we shall see later, it need not necessarily take this form. Yet as treaties are by all odds the most important form of international contracts, we will discuss them first.

#### SECTION I. TREATIES.

**Treaties are contracts between states.**

The parties to a treaty are independent states. Agreements between a state and an individual, whether this individual be the Pope, a prince or an ordinary citizen, are not treaties. All the parties must be states. Therefore, a concordat with the Pope, an agreement with a prince providing for the succession to the throne in his family, an agreement for a loan from an individual, are not treaties and with them international law has nothing to do. Prima facie each independent state has power to make a treaty, but it may place limitations on this power. As by the terms of an alliance, it may agree not to make treaties of certain kinds with other states or not to make a treaty except on certain conditions, *e. g.*, the United States bound itself by the treaty of alliance with France not to make a treaty of peace with England except upon certain conditions. In strict law, only independent states may make treaties, but as a matter of practice the power is to a limited extent conceded to semi-sovereign states. The United States has repeatedly made treaties with Indian tribes.

No specific form is necessary. The parties to a treaty



are allowed to adopt whatever form they please and whatever language. With reference to the latter, it may be said that for a long time Latin was the language generally adopted. Later, French became by far the more common; and now English is rapidly taking the place of French. Form of treaties

In common with all other contracts, a treaty must not be for an unlawful object. As, for instance, a treaty between two states giving them exclusive rights over a part of the high seas, or for taking away the inviolability of diplomatic agents, or for legalizing the capture of neutral vessels, not carrying contraband nor attempting to run a blockade, would be void. Legality of object.

What shall constitute the treaty-making power within a state is of course a matter for each state to regulate for itself. So far it is purely a question of constitutional law; but when once a state has entered into a treaty, the interpretation of its provisions with reference to the treaty-making power is a question for international law. Thus, while each state has a right to make its own provisions for the treaty-making power, it does not have the sole right to construe those rules. Treaty-making power.

As, except in pure despotisms, all treaties must be negotiated through agents, the powers of such agents become a very important matter for legal construction, since it rarely happens that the credentials of agents for negotiating treaties are so explicit as to leave nothing for implication or so clear as to admit of but one possible construction. Where agents are given what are known as full powers there was for a long time a difference of opinion as to whether or not a sovereign was bound by such a treaty, irrespective of ratification. Grotius and Puffendorf held that treaties negotiated and signed by agents with full powers are binding upon the state in whose name they are made, just as any other contract is binding upon the principal when made by his duly authorized agent. (De jure Belli Powers of agents.)

ac Pacis, Bk. II., Sec. 12; Puffendorf's de Jus Naturae et Gentium, Bk. III., Ch. IX., Sec. 2.) Upon this subject Vattel says: "Sovereigns treat with each other through the medium of their attorneys or agents, who are invested with sufficient powers for the purpose, and are commonly called plenipotentiaries. The rights of the agent are determined by instructions given him. He must not deviate from them; but every promise which he makes, within the terms of his commission, and within the extent of his powers, binds his constituent. At present, in order to avoid all danger and difficulty, princes reserve to themselves the right of ratifying what has been concluded in their name by their ministers. The full power is but a *procuracion cum libera*." (Law of Nations, Bk. II., Ch. XII., Sec. 156.)

**Ratification of  
treaties.**

The law at the present time is substantially the same as that stated by Vattel. Where the constitution of a state provides, as does the Constitution of the United States, that treaties must be ratified by a certain branch of the government, to wit, the Senate; ratification then becomes necessary to the validity of the treaty. As every state is presumed to be familiar with the constitution of every other state a failure to ratify is no ground for complaint. The case is plainer yet where ratification is provided for either in the credentials of the agent or in the treaty itself, as is now very common.

**Legislation in  
aid of.**

If, as sometimes happens, legislation is necessary in order to give life to a treaty, *e. g.*, an appropriation to carry out the provisions of the treaty for the purchase of territory, the legislative branch of the government is under no legal obligation to provide the necessary legislation. In such a case the treaty is valid, but unenforceable. This question has presented itself a number of times in the diplomatic history of the United States; among others, in the case of the purchase of Louisiana, Florida, because of the

sums to be paid to Mexico and Spain under the terms of the treaties of Guadalupe Hidalgo, and Paris, respectively. Thus far the House has never refused to perform its share towards the necessary legislation, and the Senate and President are committed upon the question when the treaty is made, so that they could by no means afford to compromise themselves by refusing the legislation.

Where the negotiators of a treaty are given secret instructions along with their full powers and conclude a treaty contrary to their secret instructions, the question arises as to what moral obligation the sovereign is under to ratify such a treaty? Or, is it valid without ratification? To the first of these questions, if we follow the analogy of the law of contracts between individuals, we must conclude that as the other party has no knowledge of the contents of secret instructions the violation of them by the agent would have no effect upon the validity of the contract so that if the treaty would have been valid without ratification, provided the instructions had been obeyed, it is equally valid when they are disobeyed. And this is the view taken by Klüber and Martens. The former says: "Public treaties can only be concluded in a valid manner by the ruler of the state, who represents it toward foreign nations, either immediately by himself, or through the agency of plenipotentiaries, and in a manner conformable to the constitutional laws of the state. A treaty concluded by such a plenipotentiary is valid, provided he has not transcended his patent full power; and a subsequent ratification is only required in the case where it is expressly reserved in the full power, or stipulated in the treaty itself, as is usually the case at present in all those conventions which are not, such as military arrangements are, of urgent necessity." (Klüber, *Droit des Gens Moderne de l'Europe*, Sec. 142; Martens, *Precis du Droit des Gens Moderne de l'Europe*, Sec. 48.)

**Moral effect of disobedience of instructions.**

The disobedience of instructions does, however, have a bearing upon the moral obligation to ratify a treaty negotiated by plenipotentiaries. There is in the case of such a treaty a moral obligation to ratify, unless some substantial reason can be given for the refusal. The material deviation of a plenipotentiary from his instructions would constitute such a reason. Vattel seems to make this the only reason for a refusal to ratify; he says: "Before a sovereign can honorably refuse to ratify that which has been concluded in virtue of a full power, he must have strong and solid reasons, and in particular, he must show that his minister has deviated from his instructions."

**View of Wheaton.**

The following from Wheaton is a more correct statement of the law: "The exposition of the approved practice of nations, from which alone the law of nations applicable to this matter can be deduced, conclusively shows that a full power, however general, and even extending to a promise to ratify, does not involve the obligation of ratifying in a case where the plenipotentiary has deviated from his instructions." (International Law, Part III., Sec. 261.) In addition to this he gives the following reasons for refusal to ratify: 1. "If the impossibility of fulfilling the treaty arises or is discovered previous to the exchange of ratifications, it may be refused on this ground. 2. Upon the ground of mutual error of the parties respecting a matter of fact, which, had it been known in its true circumstances, would have prevented the conclusion of the treaty. Here, also, if the error be discovered previous to the ratification, it may be withheld upon this ground.

3. In case of a change of circumstances upon which the treaty is made to depend, either by an express stipulation (*clausula rebus sic stantibus*), or by the nature of the treaty itself. As such a change of circumstances would avoid the treaty, even after ratification, so if it take place previous to the ratification, it will afford a strong and

valid reason for withholding that sanction." (Ibid., Sec. 263.)

Ratification may be either tacit or express. The latter is by far the more ordinary and needs no discussion. A tacit or implied ratification is where persons acting under the authority of the treaty-making power enter into agreements with other states and though such agreements are known to the treaty-making power are not promptly repudiated by it so that the other party acts to his detriment, believing in good faith that the agreement, which does not require express ratification, has met with the approval of the treaty-making power. In the case of treaties, nearly all states now require express ratification. So nearly universal is this that it may safely be said to be a rule of positive international law.

The binding effect of a treaty, when once ratified, dates back to the time of its signature. That is to say, the ratification of a treaty has a retroactive effect. It is not unusual, though more so now than formerly, to provide in the treaty the time at which it shall go into effect in different places. The change in this respect is due to the improvement in the means of conveying intelligence.

It rarely happens that, in the case of treaties requiring ratification, anything is done towards carrying out the provisions of a treaty until after its ratification. To this the treaty of July 15, 1840, between Great Britain, Prussia, Russia and Turkey, forms a curious exception. By the terms of this treaty, or rather of the protocol annexed to it, it was provided that, owing to the delay which ratification would necessitate because of the distance between the respective parties, the measures agreed upon should be carried into execution at once, without waiting for the exchange of ratifications. In such a case there would have to be exceptionally strong reasons to justify a refusal

Ratification  
tacit or express.

Date when  
treaty becomes  
binding.

Treaty of 1840  
exceptional.

to ratify; yet, to the full validity of the treaty, ratification is necessary.

**Interpretation  
of treaties.**

The interpretation of treaties is a matter of great importance, for it frequently happens that in course of years differences of opinion arise as to what was actually meant by certain provisions. As the meanings of words change somewhat in course of several years, these differences of opinion might arise, even if they were not prompted by a conflict in interests. For many other reasons disputes arise as to the interpretation of treaties. Rules of interpretation are therefore necessary. While there is not universal agreement with respect to the rules of interpretation the following are pronounced by Hall to be "those rules against which no objection can be urged." 1. "When the language of a treaty, taken in the ordinary meaning of words, yields a plain and reasonable sense, it must be taken as intended to be read in that sense, subject to the qualifications, that any words which may have a customary meaning in treaties, differing from their common signification, must be understood to have that meaning, and that a sense cannot be adopted which leads to an absurdity, or to incompatibility of the contract with an accepted fundamental principle of law.

2. "When terms used in a treaty have a different legal sense within the two contracting states, they are to be understood in the sense which is proper to them within the state to which the provision containing them applies; if the provision applies to both states, the terms of double meaning are to be understood in the sense proper within them respectively.

3. "When the words of a treaty fail to yield a plain and reasonable sense they should be interpreted in such one of the following ways as may be appropriate: (a) By recourse to the general sense and spirit of the treaty, as shown by the context of the incomplete, improper, am-

biguous, or obscure passages, or by the provisions of the instrument as a whole.

(b.) "By taking a reasonable instead of a literal sense of words when the two senses do not agree.

4. "Whenever, or in so far as, a state does not contract itself out of its fundamental legal rights by express language, a treaty must be so construed as to give effect to those rights.

(5.) "Subject to the foregoing rule, every right or obligation which is necessarily attendant upon something clearly ascertained to be agreed to in the treaty, including a right to whatever may be necessary to the enjoyment of things granted by it, is understood to be tacitly given or imposed by the gift or imposition of that upon which it is attendant."

If but one of these rules is applicable there is little difficulty, but it sometimes happens that one nation contends for the application of one and the other nation for the application of another rule. As in the case of the treaty of Aix la Chapelle, 1748, England contended that the first rule applied, while Holland insisted that rule three was the one which applied. The treaty was one of alliance by the terms of which each promised the other specific assistance in case either should "be attacked or molested by hostile act, or open war, or in any other manner disturbed in the possession of its states, territories, rights, immunities and freedom of commerce." When England demanded help in her war with France, 1756, Holland refused to give the stipulated assistance, on the ground that, although England had been "attacked" by France, she (England) was the aggressor and that therefore the situation was not the one contemplated by the treaty. Upon this point the contention of Holland is in accord with the view of international law which prevails at the present time.

Conflict as to  
what rule ap-  
plies.

**Treaty between  
Austria and  
Italy.**

Rule two is well illustrated by the treaty between Austria and Italy of 1866 by which it was provided that the "inhabitants of the ceded territory should be allowed to remove themselves and their property into Austrian territory," provided they chose to exercise this right within a year and a day from the date of the exchange of ratifications. But in Austria the term "inhabitant" meant only such persons as according to Austrian law had their domicile in the territory, while according to Italian law it meant any one living in the territory and registered as a resident.

**Treaty of  
Utrecht.**

Perhaps the best illustration of the third rule is the controversy which grew out of the Treaty of Utrecht. By the terms of this treaty, France was to destroy the fortifications of the port of Dunkirk and never to rebuild them. In accordance with the treaty, she destroyed them, but at the same time began fortifying the port of Mardyck which was an equally important harbor and not more than a league distant. England contended that while literally the treaty referred only to Dunkirk, the spirit and purpose of the treaty was to relieve England of the menace of having a fortified French port opposite the mouth of the Thames and that for this reason it applied to Mardyck as well as to Dunkirk. France finally admitted the reasonableness of the English contention and discontinued the work of fortifying Mardyck.

Where provisions in the same treaty or in different treaties with the same state conflict, the following rules are found useful:—

**Rules as to  
conflicting  
provisions.**

1. Provisions that are generally and specially imperative take precedence over a mere general permission, but on the other hand, a special permission which conflicts with an imperative general provision is given precedence over it.

2. If to one provision a penalty is attached for non-observance, and to another there is no penalty attached,



the former is presumed to be the more important and must be complied with.

3. If provisions indetical in nature conflict, the promisee has the right to determine which shall be conformed to.

Where different treaties between the same states contain conflicting provisions, the one of later date controls, as it is presumed to have been intentionally substituted for the earlier provision.

Treaties may be divided according to their character into executed and executory. The first class includes those treaties the conditions of which have been performed once for all and nothing more remains to be done except to not interfere, as for instance a treaty recognizing the independence of a state or fixing boundary lines. The second includes those the fulfillment of whose conditions is yet continuing and may continue as long as the treaty remains in full force, *e. g.*, treaties of commerce or extradition. Executory and executed treaties.

With respect to the purpose for which they are entered into, treaties may be divided into any number of classes, as treaties may be formed for any lawful purpose. The most common purposes are: commerce, extradition, cession of territory, fixing of boundaries, neutrality, alliance, guaranty, and arbitration. The most of these are so well understood as to need no discussion, but with reference to others a word or two may not be amiss. Purposes.

A treaty of guaranty is either mutual, as where the parties bind themselves to assist each other in maintaining a certain condition of affairs; or, where two or more enter into a treaty the benefits from which are to accrue to a third power. Treaties of guaranty of the first class used to be very common with reference to territorial possessions of states. Examples of treaties of the second class are the treaties between the powers of Europe guarantying the neutrality of Switzerland and Belgium. Treaty of guaranty.

**Treaties of  
alliance.**

Treaties of alliance are either offensive, or defensive, or both. Each of these may be either general or special. An example of the latter is the Anglo-Japanese alliance which applies only to the Far East. In case of a defensive alliance a party to the treaty is not under obligation to assist its ally in a war in which it may be engaged, regardless of who was really the aggressor.

**Treaties of  
reciprocity.**

Treaties of reciprocity are of interest because of their relation to the "most favored nation clause" in other treaties by the same powers. For a time it was contended that privileges granted to a state inured to the benefit of all other states having with the granting state treaties containing the "most favored nation clause," regardless of the inducement for granting such privileges. But it is now generally conceded that where a privilege is granted in return for a valuable consideration, as is the case in reciprocity treaties, such transaction gives to other states no right to the special privilege by virtue of the "most favored nation clause."

**Sanction of  
treaties.**

The assurance that the terms of a treaty will be carried out rests usually upon good faith and honor of the respective parties, but at times additional security is resorted to. If there is doubt as to the intent of one of the parties, the other may take or retain possession of a part of its territory and hold it as a pledge to secure the due performance of the terms of the treaty. This was resorted to by Prussia at the end of the Franco-Prussian war. In place of this the guarantee of a third power may be accepted. The taking of hostages, though at one time common, is now obsolete.

**Effect of change  
of government.**

Changes in the internal government of a state, unless they amount to a loss of independence, do not affect the operation of treaties. A mere change in the form of government is a matter with which international law does not concern itself. The loss of a part of its territory does not

affect the obligation of a state under its treaties, unless such loss renders the performance of the conditions of a treaty impossible. When personal treaties were recognized as treaties, a mere change in the form of government might, by rendering the terms of the treaty no longer applicable, extinguish it, *e. g.*, a treaty with a certain person or family guarantying to him or them succession to the throne would be extinguished by a change to republican form of government. But as such personal agreements are no longer considered treaties we need not dwell upon them here.

The effect which war produces upon treaties depends upon the nature of the treaty. Though it has been con- Effect of war upon treaties. tended that war abrogates all treaties, this contention is not correct. With reference to executed treaties it either produces no effect at all or at most simply suspends their operation during the continuance of the war, at the close of which they go into effect again *ex proprio vigore*, unless changed by express stipulation. Upon this question there is a very able opinion by the Supreme Court of the United States in the case of *Chirac v. Chirac*, 2 Wheaton, 277.

As to executory treaties, most are abrogated by the existence of war between the parties thereto, and must at the close of the war be revived by either express or implied Executory treaties in contemplation of war. agreement in order to come again into force, *e. g.*, treaties of commerce, alliance, etc. Executory treaties made in contemplation of war for the purpose of governing the conduct of the respective parties during such war are of course neither abrogated nor suspended during war, but are brought into operation by it. To argue that war either abrogated or suspended such treaties would be the veriest nonsense.

The effect of war upon the fishery rights of the United States referred to in Art. III. of the treaty of peace

**Dispute with  
England over  
fishery rights.**

between the United States and Great Britain, 1783, was for a long time a matter of dispute between the two countries. This provision of the treaty was not mentioned in the treaty of 1814. It was therefore claimed by the British government that the right no longer existed. In its contention the British government, though such was not essential to the establishment of its case, went so far as to take the wholly untenable ground that "all treaties are put an end to by a subsequent war." To this the United States replied that the provisions in the treaty of 1783 as to fisheries and independence did not create but simply recognized those rights and that neither provision was abrogated by the war.

This contention was not sound in point of law. Whatever moral right we may have had in the fisheries by reason of helping to wrest the coast from France, or by reason of discovery, our legal right to enjoyment of such portions as were within the territorial waters of Great Britain rested upon the provisions contained in Article III. of the treaty of 1783, and this article was not, like the article recognizing our independence, an executed agreement, but was clearly executory and, in common with commercial agreements, was of such a nature as to be abrogated by war. After considerable dispute we yielded, and concluded with Great Britain the treaty of 1818, which modified very materially the provisions of the treaty of 1783. By the reciprocity treaty of 1854 our rights were enlarged, but upon the failure to renew that treaty in 1866 our rights were again placed upon the basis of the treaty of 1818.

**Termination of  
treaties.**

Treaties come to an end either by a limitation of time contained in the treaties themselves; by mutual consent of the parties; by renunciation by one of the parties, this, however, does not bring to an end the right of a party to damages; by denunciation after a certain period of time stipulated in the treaty; by the impossibility of execution,

as in the case of a treaty for the cession of an island, if the island should sink into the sea or be wrested from the ceding state by conquest before the transfer was to take place; by completion of the object for which the treaty was entered into.

With reference to treaties which are not permanent, but entered into for a fixed number of years, it is not at all unusual to find in them provisions for their renewal. Where such provisions are found, a valid renewal must conform substantially to the required form. But if no provision for renewal is to be found, a renewal may be effected by any acts or words which constitute sufficient evidence of an intention to renew. In other words, a treaty may be renewed either tacitly or expressly. The difficulty with a tacit renewal is in determining what is sufficient evidence of an intent to renew. In some cases it is entirely clear, as where the treaty provides for the payment of a fixed amount at the beginning of each year for the enjoyment of a certain privilege, the payment and acceptance of this amount at the beginning of the year after the expiration of the treaty would be ample evidence of an intent to renew for that year, since it could not reasonably be argued that the money was intended as a gift.

Renewal of treaties.

## SECTION II. CONTRACTS OF A STATE NOT AMOUNTING TO TREATIES.

The term protocol is used in different senses: (1) The proceedings leading up to the conclusion of a treaty; (2) A separate article attached to a treaty; (3) A rough draft of treaty which is to serve as a basis for negotiations; (4) An agreement intended to be complete without ratification. Such an agreement is usually intended to be temporary, it is merely to serve as a *modus vivendi* until a treaty can be negotiated. When once the treaty is negotiated, the protocol has done its work and is at an end.

Protocols.

Examples of by  
the United  
States.

As examples of protocols to which the United States has been a party we have: The protocol of London, 1850, concluded by Abbott Lawrence, the American Minister, and Viscount Palmerston, by the terms of which Horseshoe Reef in Lake Erie was ceded by Great Britain to the United States on condition that the latter erect upon it a light-house and refrain from fortifying it. This agreement was never submitted to the Senate, yet as Congress appropriated the money and built the light-house, our title is hardly open to dispute. In 1890 a protocol was entered into with Mexico providing that the troops of each might, under certain conditions, pursue hostile Indians into the territory of the other and capture them. This also was never submitted to the Senate. On August 12, 1898, a protocol was entered into between the United States and Spain containing the main provisions which were afterwards embodied in the Treaty of Paris. But several acts were performed in accordance with the protocol, *e. g.*, the evacuation of Cuba and Porto Rico before it was submitted to the Senate as the Treaty of Paris. On September 7, 1901, a protocol was entered into with China by Mr. Rockhill on the part of the United States. This protocol provided for the doing of several important acts and rested upon executive authority only.

Protocol with  
Santo Domingo.

The recent protocol between the United States and San Domingo occasioned no small amount of discussion, as it was feared that the President would by a too frequent resort to the use of protocols usurp a part of the treaty-making power of the Senate. It may be that these fears were not groundless, but, so far as can be seen, they were. It can be readily seen that, as the Senate is not in continuous session, there is at times a necessity for such temporary arrangements, call them by whatever name we will. Given the need, it seems best to allow the President to make such arrangements and hold him responsible for the

abuse of the power than to cause the country the inconvenience of being able to make no agreements at all unless the Senate is in session. This, however, is a question of constitutional law and practical politics, rather than one of international law.

Until recently agreements might be made by the President in pursuance of arbitration treaties to submit disputes, of a character provided for, to the decision of an arbitration tribunal. But the Senate has recently refused to allow this also, declaring that it can now be done only by treaty. Under this view a general arbitration treaty becomes almost meaningless. It is therefore unfortunate that the Senate could not have seen things differently. To our mind, such agreements are not treaties. Under the head of "agreements under acts of Congress," John Basset Moore mentions the following: (1) Postal "treaties." Since 1872, these are made by the postmaster-general, "by and with the advice and consent of the President;" (2) Reciprocity agreements; (3) Discriminating duties, copyrights, and trade-marks; (4) Indian "treaties;" (5) The *modus vivendi*. As examples of this he cites those of 1885 between the United States and Great Britain extending the fishery rights of American citizens in Canadian waters, of 1888 covering a period not exceeding two years, of June 15, 1891, suspending the killing of seals in Behring Sea until the following May, and of 1899 concerning the Alaskan boundary; (6) The settlement of pecuniary claims, whether by treaty, executive agreement or arbitration under executive agreement.

Cartels are agreements made between generals and admirals of opposing armies and navies for the exchange of prisoners, etc. Of like character are agreements for truces, and capitulations for surrender of an army, fleet or fortress. It is obvious that under such circumstances the necessities of the case render imperative some form of agree-

ment which can be entered into more rapidly than can a treaty.

**Sponsions.**

The general term applied to such acts and engagements as the above, when entered into without authority or in excess of authority, is sponsions. Sponsions may of course be disavowed by the government of the agents who have thus acted without or have transcended their authority. This should be done with reasonable promptness, otherwise the other government may fairly conclude that the unauthorized act has been ratified, for ratification of such acts may be either express or implied.

As we have already said, a concordat with the Pope or an agreement between a state and any individual belongs here rather than under the head of treaties, as it would only lead to confusion to include under the head of treaties anything other than agreements between states.

**SOCIETY, ETC. v. NEW HAVEN.**

(8 Wheaton, 464.)

**PROPERTY RIGHTS UNDER TREATIES.**

Washington, J., delivered the opinion of the court, and, after stating the case, proceeded as follows: —

It has been contended by the counsel for the defendants: —

(1.) That the capacity of the plaintiffs, as a corporation, to hold lands in Vermont, ceased by, and as a consequence of, the Revolution.

(2.) That the society being, in its politic capacity, a foreign corporation, it is incapable of holding land in Vermont, on the ground of alienage; and that its rights are not protected by the treaty of peace.

(3.) That if they were so protected, still, the effect of the last war between the United States and Great Britain was to put an end to that treaty, and, consequently, to



rights derived under it, unless they had been revived by the treaty of peace, which was not done.

[It is not necessary to consider here the first question raised as it is not a question of international law.]

(2.) The next question is, was this property protected against forfeiture, for the cause of alienage, or otherwise, by the treaty of peace? This question, as to real estate belonging to British subjects, was finally settled in this court, in the case of *Orr v. Hodgson*, 4 W. 453, in which it was decided, that the sixth article of the treaty protected the titles of such persons to lands in the United States, which would have been liable to forfeiture, by escheat, for the cause of alienage, or to confiscation, *jure belli*.

The counsel for the defendants did not controvert this doctrine, so far as it applies to natural persons; but he contends that the treaty does not, in its terms, embrace corporations existing in England, and that it ought not to be so construed. The words of the sixth article are: "There shall be no future confiscations made, nor any prosecutions commenced, against any person or persons, for or by reason of the part which he or they may have taken in the present war; and that no person shall, on that account, suffer any future loss or damage, either in his person, liberty, or property," etc.

The terms in which this article is expressed are general and unqualified, and we are aware of no rule of interpretation applicable to treaties, or to private contracts, which would authorize the court to make exceptions by construction, where the parties to the contract have not thought proper to make them. Where the language of the parties is clear of all ambiguity, there is no room for construction. Now the parties to this treaty have agreed that there shall be no future confiscations in any case, for the cause stated. How can this court say, that this is a case where, for the cause stated, or for some other, confis-

cation may lawfully be decreed? We can discover no sound reason why a corporation existing in England may not as well hold real property in the United States, as ordinary trustees for charitable or other purposes, or as natural persons for their own use. We have seen that the exemption of either or all of those persons, from the jurisdiction of the courts of the State where the property lies, affords no such reason.

It is said that a corporation cannot hold lands, except by permission of the sovereign authority. But this corporation did hold the land in question, by permission of the sovereign authority, before, during, and subsequent to the Revolution, up to the year 1794, when the legislature of Vermont granted it to the town of New Haven; and the only question is, whether this grant was not void by force of the sixth article of the above treaty? We think it was.

Was it meant to be contended that the plaintiffs are not within the protection of this article, because they are not persons who could take part in the war, or who can be considered by the court as British subjects? If this were to be admitted, it would seem to follow that a corporation cannot lose its title to real estate, upon the ground of alienage, since in its civil capacity, it cannot be said to be born under the allegiance of any sovereign. But this would be to take a very incorrect view of the subject. In the case of *The Bank of the United States v. Deveaux*, 5 C. 86, it was stated by the court that a corporation, considered as a mere legal entity, is not a citizen, and therefore could not, as such, sue in the courts of the United States, unless the rights of the members of it, in this respect, could be exercised in their corporate name. It was added, that the name of the corporation could not be an alien or a citizen; but the corporation may be the one or the other, and the controversy is, in fact, between those persons and the opposing party.

But even if it were admitted that the plaintiffs are not within the protection of the treaty, it would not follow that their rights to hold the land in question was divested by the act of 1794, and became vested in the town of New Haven. At the time when this law was enacted, the plaintiffs, though aliens, had a complete, though defeasible, title to the land, of which they could not be deprived for the cause of alienage, but by an inquest of office; and no grant of the State could, upon the principles of the common law, be valid, until the title of the State was so established. *Fairfax's Devisee v. Hunter's Lessee*, 7 C. 603. Nor is it pretended by the counsel for the defendants that this doctrine of the common law was changed by any statute law of the State of Vermont, at the time when this land was granted to the town of New Haven. This case is altogether unlike that of *Smith v. The State of Maryland*, 6 C. 286, which turned upon an act of that State, passed in the year 1780, during the revolutionary war, which declared that all property within the State, belonging to British subjects, should be seized, and was thereby confiscated to the use of the State; and being in the actual seisin and possession of the estates so confiscated, without any office found, entry, or other act to be done. The law in question passed long after the treaty of 1783, and, without confiscating or forfeiting this land, (even if that could be legally done,) grants the same to the town of New Haven.

(3.) The last question respects the effect of the late war between Great Britain and the United States upon rights existing under the treaty of peace. Under this head, it is contended by the defendants' counsel, that although the plaintiffs were protected by the treaty of peace, still, the effect of the last war was to put an end to that treaty, and, consequently, to civil rights derived under it, unless they had been revived and preserved by the treaty of Ghent.

If this argument were to be admitted in all its parts, it nevertheless would not follow, that the plaintiffs are not entitled to a judgment on this special verdict. The defendants claim title to the land in controversy solely under the act of 1794, stated in the verdict, and contend that, by force of that law, the title of the plaintiffs was divested. But if the court has been correct in its opinion upon the first two points, it will follow that the above act was utterly void, being passed in contravention of the treaty of peace, which in this respect is to be considered as the supreme law. Remove that law, then, out of the case, and the title of the plaintiffs, confirmed by the treaty of 1794, remains unaffected by the last war, it not appearing from the verdict that the land was confiscated, or the plaintiffs' title in any way divested, during the war, or since, by office found, or even by any legislative act.

But there is a still more decisive answer to this objection, which is, that the termination of a treaty cannot divest rights of property already vested under it.

If real estate be purchased or secured under a treaty, it would be most mischievous to admit that the extinguishment of the treaty extinguished the right to such estate. In truth, it no more affects such rights, than the repeal of a municipal law affects rights acquired under it. If, for example, a statute of descents be repealed, it has never been supposed that rights of property, already vested during its existence, were gone by such repeal. Such a construction would overturn the best established doctrines of law, and sap the very foundation on which property rests.

But we are not inclined to admit the doctrine urged at the bar, that treaties become extinguished, *ipso facto*, by war between the two governments, unless they should be revived by an express or implied renewal on the return of peace. Whatever may be the latitude of doctrine laid down by elementary writers on the law of nations, dealing

in general terms in relation to this subject, we are satisfied that the doctrine contended for is not universally true. There may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a permanent arrangement of territorial and other national rights, or which, in their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war. If such were the law, even the treaty of 1783, so far as it fixed our limits, and acknowledged our independence, would be gone, and we should have had again to struggle for both upon original revolutionary principles. Such a construction was never asserted, and would be so monstrous as to supersede all reasoning.

We think, therefore, that treaties stipulating permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are at most only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace.

A majority of the court is of the opinion that judgment upon this special verdict ought to be given for the plaintiffs, which opinion is to be certified to the circuit court.

**FOSTER v. NEILSON.**

(2 Peters, 299.)

**CONSTRUCTION OF TREATIES.**

Marshall, C. J., delivered the opinion of the court.

This suit was brought by the plaintiffs in error in the court of the United States for the eastern district of Louisiana, to recover a tract of land lying in that district, abor

thirty miles east of the Mississippi, and in the possession of the defendant. The plaintiffs claimed under a grant for 40,000 arpens of land, made by the Spanish governor, on the 2d of January, 1804, to Jayme Joydra, and ratified by the King of Spain on the 29th day of May, 1804. The petition and order of survey are dated in September, 1803, and the return of the survey itself was made on the 27th of October in the same year. The defendant excepted to the petition of the plaintiffs, alleging that it does not show a title on which they can recover; that the territory, within which the land claimed is situated, had been ceded, before the grant, to France, and by France to the United States; and that the grant is void, being made by persons who had no authority to make it. The court sustained the exception, and dismissed the petition. The cause is brought before this court by a writ of error.

The case presents this very intricate, and at one time very interesting question: To whom did the country between the Iberville and the Perdido rightfully belong, when the title now asserted by the plaintiffs was acquired?

This question has been repeatedly discussed, with great talent and research, by the government of the United States and that of Spain. The United States have perseveringly and earnestly insisted, that, by the treaty of St. Ildefonso, made on the 1st of October in the year 1800, Spain ceded the disputed territory, as part of Louisiana, to France; and that France, by the treaty of Paris, signed on the 30th of April, 1803, and ratified on the 21st of October in the same year, ceded it to the United States. Spain has, with equal perseverance and earnestness, maintained that her cession to France comprehended that territory only which was at that time denominated Louisiana, consisting of the island of New Orleans, and the country she received from France west of the Mississippi.

Without tracing the title of France to its origin, we may

state with confidence that, at the commencement of the war of 1756, she was the undisputed possessor of the province of Louisiana, lying on both sides of the Mississippi, and extending eastward beyond the bay of Mobile. Spain was at the same time in possession of Florida, and it is understood that the River Perdido separated the two provinces from each other.

Such was the state of possession and title at the treaty of Paris, concluded between Great Britain, France, and Spain, on the 10th day of February, 1763. By that treaty, France ceded to Great Britain the river and port of Mobile, and all her possessions on the left side of the River Mississippi, except the town of New Orleans and the island on which it is situated, and by the same treaty, Spain ceded Florida to Great Britain. The residue of Louisiana was ceded by France to Spain, in a separate and secret treaty between those two powers. The King of Great Britain being thus the acknowledged sovereign of the whole country east of the Mississippi, except the island of New Orleans, divided his late acquisition in the south into two provinces, East and West Florida. The latter comprehended so much of the country ceded by France as lay south of the 31st degree of north latitude, and a part of that ceded by Spain.

By the treaty of peace between Great Britain and Spain, signed at Versailles on the 3d of September, 1783, Great Britain ceded East and West Florida to Spain, and those provinces continued to be known and governed by those names, as long as they remained in the possession and under the dominion of his Catholic Majesty.

On the 1st of October, in the year 1800, a secret treaty was concluded between France and Spain at St. Ildefonso, the third article of which is in these words: "His Catholic Majesty promises and engages, on his part, to retrocede to the French republic, six months after the full and entire

execution of the conditions and stipulations relative to his royal highness, the Duke of Parma, the colony or province of Louisiana, with the same extent that it now has in the hands of Spain, and that it had when France possessed it, and such as it should be after the treaties subsequently entered into between Spain and the other States."

The treaty of the 30th of April, 1803, by which the United States acquired Louisiana, after reciting this article, proceeds to state that "the first consul of the French republic doth hereby cede to the United States, in the name of the French republic, forever and in full sovereignty, the said territory, with all its rights and appurtenances, as fully and in the same manner as they have been acquired by the French republic, in virtue of the above-mentioned treaty concluded with his Catholic Majesty." The 4th article stipulates that "there shall be sent, by the government of France, a commissary to Louisiana to the end that he do every act necessary, as well to receive from the officers of his Catholic Majesty the said country and its dependencies in the name of the French republic, if it has not already been done, as to transmit it in the name of the French republic, to the commissary or agent of the United States."

On the 30th of November, 1803, Peter Clement Laussatt, colonial prefect and commissioner of the French republic, authorized by full powers, dated the 6th of June, 1803, to receive the surrender of the province of Louisiana, presented those powers to Don Manuel Salcedo, governor of Louisiana and West Florida, and to the Marquis de Casa Calvo, commissioners on the part of Spain, together with full powers to them from his Catholic Majesty to make the surrender. These full powers were dated at Barcelona, the 15th of October, 1802. The act of surrender declares that, in virtue of these full powers, the Spanish commissioners, Don Manuel Salcedo and the Marquis de Casa



Calvo, "put from this moment the said French commissioner, the citizen Laussatt, in possession of the colony of Louisiana and of its dependencies, as also of the town and island of New Orleans, in the same extent which they now have, and which they had in the hands of France when she ceded them to the royal crown of Spain, and such as they should be after the treaties subsequently entered into between the states of his Catholic Majesty and those of other powers."

The following is an extract from the order of the King of Spain referred to by the commissioners in the act of delivery. "Don Carlos, by the grace of God," etc. "Deeming it convenient to retrocede to the French republic the colony and province of Louisiana, I order you, as soon as the present order shall be presented to you by General Victor or other officer duly authorized by the French republic, to take charge of said delivery; you will put him in possession of the colony of Louisiana and its dependencies, as also of the city and island of New Orleans, with the same extent that it now has, that it had in the hands of France when she ceded it to my royal crown, and such as it ought to be after the treaties which have successively taken place between my States and those of other powers."

Previous to the arrival of the French commissioner, the governor of the provinces of Louisiana and West Florida, and the Marquis de Casa Calvo, had issued their proclamation, dated the 18th of May, 1803, in which they say: "His Majesty having before his eyes the obligations imposed by the treaties, and desirous of avoiding any disputes that might arise, has deigned to resolve that the delivery of the colony and island of New Orleans, which is to be made to the general of division, Victor, or such other officer as may be legally authorized by the government of the French republic, shall be executed on the same terms that France ceded it to his Majesty, in virtue of which the

limits of both shores of the River St. Louis or Mississippi shall remain as they were irrevocably fixed by the 7th article of the definite treaty of peace, concluded at Paris the 10th of February, 1763, according to which the settlements from the River Manshao or Iberville to the line which separates the American territory from the dominions of the king, remain in the possession of Spain and annexed to West Florida."

On the 31st of October, 1803, Congress passed an act to enable the President to take possession of the territory ceded by France to the United States, in pursuance of which commissioners were appointed, to whom Monsieur Laussatt, the commissioner of the French republic, surrendered New Orleans and the province of Louisiana on the 20th of December, 1803. The surrender was made in general terms; but no actual possession was taken of the territory lying east of New Orleans. The government of the United States, however, soon manifested the opinion that the whole country originally held by France and belonging to Spain when the treaty of St. Ildefonso was concluded, was, by that treaty, retroceded to France.

On the 24th of February, 1804, Congress passed an act for laying and collecting duties within the ceded territories, which authorized the President, whenever he should deem it expedient, to erect the shores, etc., of the bay and River Mobile, and on the other rivers, creeks, etc., emptying into the Gulf of Mexico east of the said River Mobile, and west thereof to the Pascagoula inclusive, into a separate district, and to establish a port of entry and delivery therein. The port established in pursuance of this act was at Fort Stoddert within the acknowledged jurisdiction of the United States; and this circumstance appears to have been offered as a sufficient answer to the subsequent remonstrances of Spain against the measure. It must be considered, not as acting on the territory, but as indicating the American

exposition of the treaty, and exhibiting the claim its government intended to assert.

In the same session, on the 26th of March, 1804, Congress passed an act erecting Louisiana into two territories. This act declares that the country ceded by France to the United States south of the Mississippi territory, and south of an east and west line, to commence on the Mississippi River at the 33d degree of north latitude, and run west to the western boundary of the cession, shall constitute a territory under the name of the territory of Orleans. Now, the Mississippi territory extended to the 31st degree of north latitude, and the country south of that territory was necessarily the country which Spain held as West Florida; but still, its constituting a part of the territory of Orleans depends on the fact that it was a part of the country ceded by France to the United States. No practical application of the laws of the United States to this part of the territory was attempted, nor could be made while the country remained in the actual possession of a foreign power.

The 14th section enacts "that all grants for lands within the territory ceded by the French republic to the United States by the treaty of the 30th of April, 1803, the title whereof was at the date of the treaty of St. Ildefonso in the crown, government, or nation of Spain, and every act and proceeding subsequent thereto, of whatsoever nature, towards the obtaining any grant, title, or claim, to such lands, and under whatsoever authority transacted or pretended, be, and the same are hereby declared to be, and to have been from the beginning, null, void, and of no effect in law or equity." A proviso excepts the titles of actual settlers acquired before the 20th of December 1803, from the operation of this section. It was obviously intended to act on all grants made by Spain after her retrocession of Louisiana to France, and, without deciding on the extent of that retrocession, to put the titles which

might be thus acquired through the whole territory, whatever might be its extent, completely under the control of the American government.

The President was authorized to appoint registers or recorders of lands acquired under the Spanish and French governments, and boards of commissioners who should receive all claims to lands, and hear and determine in a summary way all matters respecting such claims. Their proceedings were to be reported to the secretary of the treasury, to be laid before Congress for the final decision of that body.

Previous to the acquisition of Louisiana, the ministers of the United States had been instructed to endeavor to obtain the Floridas from Spain. After that acquisition this object was still pursued, and the friendly aid of the French government towards its attainment was requested. On the suggestion of M. Talleyrand, that the time was unfavorable, the design was suspended. The government of the United States, however, soon resumed its purpose, and the settlement of the boundaries of Louisiana was blended with the purchase of the Floridas, and the adjustment of heavy claims made by the United States for American property, condemned in the ports of Spain during the war which was terminated by the treaty of Amiens.

On his way to Madrid, Mr. Monroe, who was empowered in conjunction with Mr. Pinckney, the American minister at the court of his Catholic Majesty, to conduct the negotiation, passed through Paris, and addressed a letter to the minister of exterior relations, in which he detailed the objects of his mission and his views respecting the boundaries of Louisiana. In his answer to this letter, dated the 21st of December, 1804, M. Talleyrand declared, in decided terms, that, by the treaty of St. Ildefonso, Spain retroceded to France no part of the territory east of the Iberville, which had been held and known as West Florida;

and that, in all the negotiations between the two governments, Spain had constantly refused to cede any part of the Floridas, even from the Mississippi to the Mobile. He added that he was authorized by his imperial majesty to say that, at the beginning of the year 1802, General Bournonville had been charged to open a new negotiation with Spain for the acquisition of the Floridas, but this project had not been followed by a treaty.

Had France and Spain agreed upon the boundaries of the retroceded territory before Louisiana was acquired by the United States, that agreement would undoubtedly have ascertained its limits. But the declarations of France, made after parting with the province, cannot be admitted as conclusive. In questions of this character, political considerations have too much influence over the conduct of nations, to permit their declarations to decide the course of an independent government in a matter vitally interesting to itself.

Soon after the arrival of Mr. Monroe at his place of destination, the negotiations commenced at Aranjuez. Every word in that article of the treaty of St. Ildefonso which ceded Louisiana to France, was scanned by the ministers, on both sides, with all the critical acumen which talents and zeal could bring into their service. Every argument drawn from collateral circumstances, connected with the subject, which could be supposed to elucidate it, was exhausted. No advance towards an arrangement was made, and the negotiation terminated leaving each party firm in his original opinion and purpose. Each persevered in maintaining the construction with which he had commenced. The discussion has since been resumed between the two nations with as much ability and with as little success. The question has been again argued at this bar with the same talent and research which it has uniformly called forth. Every topic which relates to it has been completely exhausted;

and the court, by reasoning on the subject, could only repeat what is familiar to all.

We shall say only, that the language of the article may admit of either construction, and it is scarcely possible to consider the arguments on either side without believing that they proceed from a conviction of their truth. The phrase on which the controversy mainly depends, that Spain retrocedes Louisiana with the same extent that it had when France possessed it, might so readily have been expressed in plain language that it is difficult to resist the persuasion that the ambiguity was intentional. Had Louisiana been retroceded with the same extent that it had before the cession of any part of it to England, no controversy respecting its limits could have arisen. Had the parties concurred in their intention, a plain mode of expressing that intention would have presented itself to them. But Spain has always manifested infinite repugnance to the surrender of territory, and was probably unwilling to give back more than she had received. The introduction of ambiguous phrases into the treaty, which power might afterwards construe according to circumstances, was a measure which the strong and the politic might not be disinclined to employ.

However this may be, it is, we think, incontestable, that the American construction of the article, if not entirely free from question, is supported by arguments of great strength which cannot be easily confuted.

In a controversy between two nations concerning national boundary, it is scarcely possible that the courts of either should refuse to abide by the measures adopted by its own government. There being no common tribunal to decide between them, each determines for itself on its own rights, and if they cannot adjust their differences peaceably, the right remains with the strongest. The judiciary is not that department of the government to which the assertion of its interests against foreign powers is confided; and its

duty, commonly, is to decide upon individual rights according to those principles which the political departments of the nation have established. If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous.

We think, then, however individual judges might construe the treaty of St. Ildefonso, it is the province of the court to conform its decisions to the will of the legislature, if that will has been clearly expressed.

The convulsed state of European Spain affected her influence over her colonies, and a degree of disorder prevailed in the Floridas, at which the United States could not look with indifference. In October, 1810, the President issued his proclamation, directing the governor of the Orleans territory to take possession of the country as far east as the Perdido, and to hold it for the United States. This measure was avowedly intended as an assertion of the title of the United States; but as an assertion which was rendered necessary in order to avoid evils which might contravene the wishes of both parties, and which would still leave the territory "a subject of fair and friendly negotiation and adjustment."

In April, 1812, Congress passed "an act to enlarge the limits of the State of Louisiana." This act describes lines which comprehend the land in controversy, and declares that the country included within them shall become and form a part of the State of Louisiana.

In May, of the same year, another act was passed, annexing the residue of the country west of the Perdido to the Mississippi territory.

And, in February, 1813, the President was authorized "to occupy and hold all that tract of country called West Florida, which lies west of the River Perdido, not now in possession of the United States."

On the third of March, 1817, congress erected that part

of Florida which had been annexed to the Mississippi territory, into a separate territory, called Alabama.

The powers of government were extended to and exercised in those parts of West Florida which composed a part of Louisiana and Mississippi, respectively; and a separate government was erected in Alabama.

In March, 1819, "congress passed an act to enable the people of Alabama to form a constitution and state government." And in December, 1819, she was admitted into the Union, and declared one of the United States of America. The treaty of amity, settlement, and limits between the United States and Spain was signed at Washington on the 22d day of February, 1819, but was not ratified by Spain till the 24th day of October, 1820; nor by the United States until the 22d day of February, 1821. So that Alabama was admitted into the Union as an independent State, in virtue of the title acquired by the United States to her territory under the treaty of April, 1803.

After these acts of sovereign power over the territory in dispute, asserting the American construction of the treaty by which the government claims it, to maintain the opposite construction in its own courts would certainly be an anomaly in the history and practice of nations. If those departments which are intrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied. A question like this respecting the boundaries of nations, is, as has been truly said, more a political than a legal question; and in its discussion, the courts of every country must respect the pronounced will of the legislature. Had this suit been instituted immediately after the passage



of the act for extending the bounds of Louisiana, could the Spanish construction of the treaty of St. Ildefonso have been maintained? Could the plaintiff have insisted that the land did not lie in Louisiana, but in West Florida; that the occupation of the country by the United States was wrongful: and that his title under a Spanish grant must prevail, because the acts of congress on the subject were founded on a misconstruction of the treaty? If it be said that this statement does not present the question fairly, because a plaintiff admits the authority of the court, let the parties be changed. If the Spanish grantee had obtained possession so as to be the defendant, would a court of the United States maintain his title under a Spanish grant, made subsequent to the acquisition of Louisiana, singly on the principle that the Spanish construction of the treaty of St. Ildefonso was right, and the American construction wrong? Such a decision would, we think, have subverted those principles which govern the relations between the legislature and judicial departments, and mark the limits of the court.

If the rights of the parties are in any degree changed, that change must be produced by the subsequent arrangement made between the two governments.

A "treaty of amity, settlement, and limits, between the United States of America and the king of Spain," was signed at Washington on the 22d day of February, 1819. By the 2nd article, "his Catholic Majesty cedes to the United States in full property and sovereignty, all the territories which belong to him, situated to the eastward of the Mississippi, known by the name of East and West Florida."

The eighth article stipulates that, "all the grants of land made before the 24th of January, 1818, by his Catholic Majesty, or by his lawful authorities, in the said territories ceded by his Majesty to the United States, shall

be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his Catholic Majesty."

The court will not attempt to conceal the difficulty which is created by these articles."

It is well known that Spain had uniformly maintained her construction of the treaty of St. Ildefonso. His Catholic Majesty had perseveringly insisted that no part of West Florida had been ceded by that treaty, and that the whole country which had been known by that name still belongs to him. It is then a fair inference from the language of the treaty, that he did not mean to retrace his steps, and relinquish his pretensions; but to cede on a sufficient consideration all that he had claimed as his; and consequently, by the 8th article, to stipulate for the confirmation of all those grants which he had made while the title remained in him.

But the United States had uniformly denied the title set up by the crown of Spain; had insisted that a part of West Florida had been transferred to France by the treaty of St. Ildefonso, and ceded to the United States by the treaty of April, 1803; had asserted this construction by taking actual possession of the country; and had extended its legislation over it. The United States, therefore, cannot be understood to have admitted that this country belonged to his Catholic Majesty, or that it passed from him to them by this article. Had his Catholic Majesty ceded to the United States "all the territories situated to the eastward of the Mississippi known by the name of East and West Florida," omitting the words "which belong to him," the United States, in-receiving this cession, might have sanctioned the right to make it, and might have been bound to consider the 8th article as coextensive with the second. The stipulation of the 8th article might have been construed

to be an admission that West Florida, to its full extent, was ceded by this treaty.

But the insertion of these words materially affects the construction of the article. They cannot be rejected as surplusage. They have a plain meaning, and that meaning can be no other than to limit the extent of the cession. We cannot say they were inserted carelessly or unadvisedly, but must understand them according to their obvious import.

It is not improbable that terms were selected which might not compromise the dignity of either government, and which each might understand, consistently with its former pretensions. But if a court of the United States would have been bound, under the state of things existing at the signature of the treaty, to consider the territory then composing a part of the State of Louisiana as rightfully belonging to the United States, it would be difficult to construe this article into an admission that it belonged rightfully to his Catholic Majesty.

The 6th article of the treaty may be considered in connection with the second. The 6th stipulates "that the inhabitants of the territories which his Catholic Majesty cedes to the United States by this treaty, shall be incorporated in the Union of the United States, as soon as may be consistent with the principles of the federal constitution."

This article, according to its obvious import, extends to the whole territory which was ceded. The stipulation for the incorporation of the inhabitants of the ceded territory into the Union, is coextensive with the cession. But the country in which the land in controversy lies, was already incorporated into the Union. It composed a part of the State of Louisiana, which was already a member of the American confederacy.

A part of West Florida lay east of the Perdido; and to that the right of his Catholic Majesty was acknowledged.

There was then an ample subject on which the words of the cession might operate without discarding those which limit its general expressions.

Such is the construction which the court would put on the treaties by which the United States have acquired the country east of New Orleans. But an explanation of the 8th article seems to have been given by the parties which may vary this construction.

It was discovered that three large grants, which had been supposed at the signature of the treaty to have been made subsequent to the 24th of January, 1818, bore a date anterior to that period. Considering these grants as fraudulent, the United States insisted on an express declaration annulling them. This demand was resisted by Spain; and the ratification of the treaty was for some time suspended. At length his Catholic Majesty yielded, and the following clause was introduced into his ratification: "desirous at the same time of avoiding any doubt or ambiguity concerning the meaning of the 8th article of the treaty, in respect to the date which is pointed out in it as the period for the confirmation of the grants of lands in the Floridas made by me, or by the competent authorities in my royal name, which point of date was fixed in the positive understanding of the three grants of land made in favor of the Duke of Alagon, the Count of Punon Rostro, and Don Pedro de Vargas, being annulled by its tenor; I think it proper to declare, that the said three grants have remained and do remain entirely annulled and invalid; and that neither the three individuals mentioned, nor those who may have title or interest through them, can avail themselves of the said grants at any time or in any manner; under which explicit declaration, the said 8th article is to be understood as ratified." One of these grants, that to Vargas, lies west of the Perdido.

It has been argued, and with great force, that this ex-

planation forms a part of the article. It may be considered as if introduced into it as a proviso or exception to the stipulation, in favor of grants anterior to the 24th of January, 1818. The article may be understood as if it had been written that, "all the grants of land made before the 24th of January, 1818, by his Catholic Majesty or his lawful authorities in the said territories, ceded by his Majesty to the United States, (except those made to the Duke of Alagon, the Count of Punon Rostro, and Don Pedro de Vargas,) shall be ratified and confirmed, etc."

Had this been the form of the original article, it would be difficult to resist the construction, that the expected grants were withdrawn from it by the exception, and would otherwise have been within its provisions. Consequently, that all other fair grants within the time specified, were as obligatory on the United States as on his Catholic Majesty.

One other judge and myself are inclined to adopt this opinion. The majority of the court, however, think differently. They suppose that these three large grants being made about the same time, under circumstances strongly indicative of unfairness, and two of them lying east of the Perdido, might be objected to, on the ground of fraud common to them all; without implying any opinion that one of them, which was for lands lying within the United States, and most probably in part sold by the government, could have been otherwise confirmed. The government might well insist on closing all future controversy relating to these grants, which might so materially interfere with its own rights and policy, in its future disposition of the ceded lands, and not allow them to become the subject of judicial investigation; while other grants, though deemed by it to be invalid, might be left to the ordinary course of law. The form of the ratification ought not, in their opinion, to change the natural construction of the words of the 8th article, or extend them to embrace grants not

otherwise intended to be confirmed by it. An extreme solicitude to provide against injury or inconvenience, from the known existence of such large grants, by insisting upon a declaration of their absolute nullity, can, in their opinion, furnish satisfactory proof that the government meant to recognize the small grants as valid, which, in every previous act and struggle, it had proclaimed to be void, as being for lands in the American territory.

Whatever difference may exist respecting the effect of the ratification, in whatever sense it may be understood, we think the sound construction of the eighth article will not enable this court to apply its provisions to the present case. The words of the article are "all the grants of land made before the 24th of January, 1818, by his Catholic Majesty, etc., shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his Catholic Majesty." Do these words act directly on the grants, so as to give validity to those not otherwise valid; or do they pledge the faith of the United States to pass acts which shall ratify and confirm them?

A treaty is, in its nature, a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infraterritorial; but is carried into execution by the sovereign power of the respective parties to the instrument.

In the United States, a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engage to perform a

particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court.

The article under consideration does not declare that all the grants made by his Catholic Majesty before the 24th of January, 1818, shall be valid to the same extent as if the ceded territories had remained under his dominion. It does not say that those grants are hereby confirmed. Had such been its language, it would have acted directly on the subject, and would have repealed those acts of congress which were repugnant to it; but its language is, that those grants shall be ratified and confirmed to the persons in possession, etc. By whom shall they be ratified and confirmed? This seems to be the language of contract; and, if it is, the ratification and confirmation which are promised must be the act of the legislature. Until such acts shall be passed, the court is not at liberty to disregard the existing laws on the subject. Congress appears to have understood this article as it is understood by the court. Boards of commissioners have been appointed for East and West Florida, to receive claims for lands; and, on their reports, titles to lands, not exceeding                    acres, have been confirmed, and to a very large amount. On the 23d of May, 1828, an act was passed supplementary to the several acts providing for the settlement and confirmation of private land claims in Florida; the 6th section of which enacts, "that all claims to land within the territory of Florida, enacted by the treaty between Spain and the United States of the 22d of February, 1819, which shall not be decided and finally settled under the foregoing provisions of this act, containing a greater quantity of land than the commissioners were authorized to decide, and which have not been reported as antedated or forged, etc., shall be received and adjudicated by the judge of the

superior court of the district within which the land lies, upon the petition of the claimant," etc. Provided, that nothing in this section shall be construed to enable the judges to take cognizance of any claim annulled by the said treaty, or the decree ratifying the same by the King of Spain, nor any claim not presented to the commissioners, or register or receiver. An appeal is allowed from the decision of the judge of the district to this court. No such act of confirmation has been extended to grants for land lying west of the Perdido.

The act of 1804, erecting Louisiana into two territories, has been already mentioned. It annuls all grants for lands in the ceded territories, the title whereof was, at the date of the treaty of St. Ildefonso, in the crown of Spain. The grant in controversy is not brought within any of the exceptions from the enacting clause.

The legislature has passed many subsequent acts previous to the treaty of 1819; the object of which was to adjust the title to lands in the country acquired by the treaty of 1803.

They cautiously confirm to residents all incomplete titles to lands for which a warrant or order of survey had been obtained previous to the 1st of October, 1800.

An act passed in April, 1814, confirms incomplete titles to lands in the State of Louisiana, for which a warrant or order of survey had been granted prior to the 20th of December, 1803, where the claimant, or the person under whom he claims, was a resident of the province of Louisiana on that day, or at the date of the concession, warrant, or order of survey, and where the tract does not exceed 640 acres. This act extends to those cases only which had been reported by the board of commissioners, and annexes to the confirmation several conditions which it is necessary to review, because the plaintiff does not claim to come within the provisions of the act.



On the 3d of March, 1819, Congress passed an act confirming all complete grants to land from the Spanish government, contained in the reports made by the commissioners appointed by the President, for the purpose of adjusting titles which had been deemed valid by the commissioners; and also all the claims reported as aforesaid, founded on any order of survey, *requete*, permission to settle, or any written evidence of claim derived from the Spanish authorities, which ought, in the opinion of the commissioners, to be confirmed; and which, by the said reports, appear to be derived from the Spanish government before the 20th day of December, 1803, and the land claimed to have been cultivated or inhabited on or before that day.

Though the order of survey, in this case, was granted before December 29, 1803, the plaintiff does not bring himself within this act.

Subsequent acts have passed in 1820, 1822, and 1826, but they only confirm claims approved by the commissioners, among which the plaintiff does not allege his to have been placed.

Congress has reserved to itself the supervision of the titles reported by its commissioners, and has confirmed those which the commissioners have approved, but has passed no law, withdrawing grants generally for lands west of the Perdido from the operation of the 14th section of the act of 1804, or repealing that section.

We are of opinion, then, that the court committed no error in dismissing the petition of the plaintiff, and that the judgment ought to be affirmed, with costs.

HAVER v. YAKER.

(9 Wallace, 84.)

DATE WHEN TREATY BECOMES BINDING.

Mr. Justice Davis delivered the opinion of the court.

It is undoubtedly true, as a principle of international law, that, as respects the rights of either government under it, a treaty is considered as concluded and binding from the date of its signature. In this regard the exchange of ratifications has a retroactive effect, confirming the treaty from its date. But a different rule prevails where the treaty operates on individual rights. The principle of relation does not apply to rights of this character, which were vested before the treaty was ratified. In so far as it affects them, it is not considered as concluded until there is an exchange of ratifications, and this we understand to have been decided by this court, in *Arredondo's case*, reported in 6th Peters. The reason of the rule is apparent. In this country, a treaty is something more than a contract, for the Federal Constitution declares it to be the law of the land. If so, before it can become a law, the Senate, in whom rests the authority to ratify it, must agree to it. But the Senate is not required to adopt or reject it as a whole, but may modify or amend it, as was done with the treaty under consideration. As the individual citizen, on whose rights of property it operates, has no means of knowing anything of it while before the Senate, it would be wrong in principle to hold him bound by it, as the law of the land, until it was ratified and proclaimed. And to construe the law, so as to make the ratification of the treaty relate back to its signing, thereby divesting a title already vested, would be manifestly unjust, and cannot be sanctioned.

These views dispose of this case, and we are not required to determine whether this treaty, if it had become a law at an earlier date, would have secured the plaintiffs in error the interest which they claim in the real estate left by Yaker at his death.

Judgment affirmed.

CHIRAC v. LESSEE OF CHIRAC.

(2 Wheaton, 269.)

TREATIES AFFECTING PROPERTY RIGHTS.

The first point made by the plaintiff in error is, that the estate of which John Baptiste Chirac died seised was, in his lifetime, escheatable, because it was acquired before he became a citizen of the United States; the law of the State of Maryland, according to which he took the oaths of citizenship, being virtually repealed by the constitution of the United States, and the act of naturalization enacted by Congress.

That the power of naturalization is exclusively in Congress does not seem to be, and certainly ought not to be, controverted; but, it is contended, that the act of Maryland, passed in the year 1780, "To declare and ascertain the privileges of the subjects of France residing within that State," gives to those subjects the power of holding land on the performance of certain conditions prescribed in that act. The 2d section gives to the subjects of France who may reside in the State of Maryland, all the rights of free citizens of that State. The 3d section contains a proviso restricting the privileges granted by this act, and declaring that nothing therein contained shall be construed to grant to those who should continue subjects of his most Christian majesty, and not qualify themselves as citizens of this State, any right to purchase or hold lands, or real estate, but for their respective life or years.

This act certainly requires that a French subject, who would entitle himself, under it, to hold lands in fee, should be a citizen according to the law which might be in force at the time of acquiring the estate. Otherwise, he could only purchase or hold for life or years. John Baptiste

Chirac was not a citizen, according to law, when he purchased the land in controversy.

It is unnecessary to inquire into the consequences of this state of things, because we are all of the opinion that the treaty between the United States and France, ratified in 1778, enabled the subjects of France to hold lands in the United States. That treaty declared that "subjects and inhabitants of the United States, or any one of them, shall not be reputed Aubains (that is aliens) in France." "They may, by testament, donation, or otherwise, dispose of their goods, movable or immovable, in favor of such persons as to them shall seem good; and their heirs, subjects of the said United States, whether residing in France or elsewhere, may succeed them *ab intestat* without being obliged to obtain letters of naturalization. The subjects of the most Christian king shall enjoy on their part, in all the dominions of the said States, an entire and perfect reciprocity relative to the stipulations contained in the present article."

Upon every principle of fair construction, this article gave to the subjects of France a right to purchase and hold lands in the United States.

It is unnecessary to inquire into the effect of this treaty under the confederation, because, before John Baptiste Chirac emigrated to the United States, the confederation had yielded to our present constitution, and this treaty had become the supreme law of the land.

The repeal of this treaty could not affect the real estate acquired by John Baptiste Chirac, because he was then a naturalized citizen, conformably to the act of Congress; and no longer required the protection given by treaty.

John Baptiste Chirac having died seised in fee of the land in controversy; his heirs at law being subjects of France; and there being, at that time, no treaty in exist-

ence between the two nations, did his land pass to these heirs, or did it become escheatable?

This question depends on the law of Maryland. The 4th section of the act already mentioned enacts, among other things, that if any subject of France who shall become a citizen of Maryland, "shall die intestate, the natural kindred of such decedent, whether residing in France or elsewhere, shall inherit his or her real estate, in like manner as if such decedent, and his kindred, were the citizens of this State."

An attempt has been made to avoid the effect of this claim in the act, by contending that it was passed for the sole purpose of enforcing the treaty, and was repealed by implication when the treaty was repealed.

The court does not think so. The enactment of the law is positive and its terms perpetual. Its provisions are not made dependent on the treaty; and, although the peculiar state of things then existing might constitute the principal motive for the law, the act remains in force from its words, however that state of things may change.

But, to this enacting clause is attached a proviso that whenever any subject of France shall, by virtue of this act, become seised in fee of any real estate, his or her estate, "after the term of ten years be expired, shall vest in the State, unless the person seised of the same shall, within that time, either come and settle in, and become a citizen of this State, or enfeoffe thereof some citizen of this or some other of the United States of America."

The heirs of John Baptiste Chirac then, on his death, became seised of his real estate in fee, liable to be defeated by the non-performance of the condition in the proviso above cited. The time given by the act for the performance of this condition expired in July, 1809, four months after the institution of this suit. It is admitted that the condition has not been performed; but it is contended, that the

non-performance is excused, because the heirs have been prevented from performing it by the act of law and of the party. The defendant, in the court below, has kept the heirs out of possession, under the act, of the State of Maryland, so that they have been incapable of enfeoffing any American citizen; and having been thus prevented from performing one condition, they are excused for not performing the other.

Whatever weight might be allowed to this argument, were it founded in fact, its effect cannot be admitted in this case. The heirs were not disabled from enfeoffing an American citizen. They might have entered, and have executed a conveyance for the land. Having failed to do so, their estate has terminated, unless it be supported in some other manner than by the act of Maryland.

This brings the court to a material question in the cause. While the defendants in error were seised of an estate in fee simple, determinable by their failure to perform the condition contained in the act of 1780, another treaty was entered into between the United States and France, which provides for the rights of the French subjects claiming lands by inheritance in the United States. This treaty enables the people of one country, holding lands in the other, to dispose of the same by testament, or otherwise, as they shall think proper. It also enables them to inherit lands in the respective countries, without being obliged to obtain letters of naturalization.

Had John Baptiste Chirac, the person from whom the land in controversy descended, lived till this treaty became a law of the land, all will admit that the provisions which have been stated would, if unrestrained by other limitations, have vested the estate of which he died seised in his heirs.

If no act had been passed on the subject, and the appellees had purchased lands lying in the United States,

it is equally clear that the stipulations referred to would have operated on these lands, so as to do away with that liability to forfeiture to which the real estates of aliens are exposed.

Has it the same or any effect on the estate of which the appellees were seized when it was entered into?

It has been argued that the treaty protects existing estates, and gives to French subjects a capacity to dispose and to inherit; but does not enlarge the estates.

This is true. But the estate of the defendants in error requires no enlargement. It is already a fee, although subject to be defeated by the non-performance of a condition. The question is, does this treaty dispense with the condition, or give a longer time for its performance? The condition is, that those who hold the estate shall become citizens of the United States, or shall enfeoff a citizen within ten years. Does the treaty control or dispense with this condition?

The direct object of this stipulation is, to give French subjects the rights of citizens, so far as respects property, and to dispense with the necessity of obtaining letters of naturalization. It does away with the incapacity of alienage, and places the defendants in error in precisely the same situation, with respect to lands, as if they had become citizens. It renders the performance of the condition a useless formality, and seems to the court to release the rights of the State as entirely in this case as in the case of one who had purchased instead of taking by descent. The act of Maryland has no particular reference to the case of Chirac, but is a general rule of State policy prescribing the terms on which French subjects may take and hold lands. This rule is changed by the treaty; and seems to the court that the new rule applies to all cases, as well to those where the lands have descended by virtue of the act, as to those where lands have been acquired without its aid. The

general power to dispose "without limitation," which was given by the treaty, controls the particular power to enfeoff within ten years, which is given by the act of Maryland.

But the treaty proceeds to stipulate, "that in case the laws of either of the two States should restrain strangers from the exercise of the rights of property with respect to real estate, such real estate may be sold, or otherwise disposed of, to citizens or inhabitants of the country where it may be."

In many of the States, perhaps in all of them, the laws do "restrain strangers from the exercise of the rights of property with respect to real estate," consequently, this provision limits, to a certain extent, the principles antecedently granted. What is the extent of this limitation?

It will probably prevent the French subject from inheriting or purchasing the estate of a French subject, who is not a citizen of the United States; but it cannot affect the right of him who takes or holds by virtue of the treaty, so as to deprive him of the power to do that for which this clause stipulates; that is, "to sell or otherwise dispose of the property to citizens or inhabitants of this country." This general power to sell, according to the principles of our law, and, it is presumed, of that of France, endures for life. A subject of France, then, who had acquired lands by descent or devise (perhaps also by any other mode of purchase), from a citizen of the United States, would have a right, during life, to sell or otherwise dispose of those lands, if lying in a State where lands purchased by an alien generally would be immediately escheatable on account of alienage. The court can perceive no reason for restraining this construction in the application of the treaty to the State of Maryland, where the law, instead of subjecting the estate to immediate forfeiture, protects it for ten years. The treaty substitutes the term of life for the term of ten years given by the act.



If, then, the treaty between the United States and France still continued in force, the defendant would certainly be entitled to recover the land for which this suit was instituted. But the treaty is, by an article which has been added to it, limited to eight years, which have long since expired. How does this circumstance affect the case?

The treaty was framed with a view to its being perpetual. Consequently, its language is adapted to the state of things contemplated by the parties, and no provision could be made for the event of its expiring within a certain number of years. The court must decide on the effect of this added article in the case which has occurred. It will be admitted, that a right once vested does not require, for its preservation, the continued existence of the power by which it was acquired. If a treaty, or any other law, has performed its office by giving a right, the expiration of the treaty or law cannot extinguish that right. Let us, then, inquire, whether this temporary treaty gave rights which existed only for eight years, or gave rights during eight years which survived it.

The terms of this instrument leave no doubt on this subject. Its whole effect is immediate. The instant the descent is cast, the right of the party becomes as complete as it can afterwards be made. The French subject who acquired lands by descent the day before its expiration, has precisely the same rights under it as he who acquired them the day after the formation. He is seised of the same estate, and has precisely the same power during life to dispose of it. This limitation of the compact between the two nations would act upon, and change all its stipulations, if it could affect this case. But the court is of the opinion, that the treaty had its full effect the instant a right was acquired under it; that it had nothing further to perform; and that its expiration or continuance afterwards was unimportant.

## CHAPTER VII. .

### JURISDICTION.

With the jurisdiction of a state over its own citizens within its own territory, international law does not concern itself. That question is left for constitutional law. But jurisdiction becomes a question of international law as soon as the rights exercised, or sought to be exercised, by a state conflict with the equal or superior right of another state.

One of the fields in which there has been no small amount of dispute as to the extent of a state's jurisdiction is that of how far a state may exercise jurisdiction over the open seas. Here it is evident that the question is not one for a single state to determine, but is a question between states to be determined by convention, *i. e.*, it is manifestly a question of international law. The answer to this question has been different at different periods. Under the Roman law the theory that the seas were *res communes* was pretty thoroughly established; and for a long time it was a recognized principle of international law. But the prevalence of piracy during the Middle Ages made it necessary for the state wishing to navigate a sea to clear it of pirates. Having thus spent time and means in getting 'dominion' over a particular stretch of sea, it was perhaps not unnatural for a nation to conclude that it had in this way secured to itself the right to exercise certain rights there which it was not obliged to share equally with other states. In accordance with this reasoning most of the seas were appropriated. For instance, Venice claimed the Adriatic; France, an illy-defined, yet considerable stretch of the seas adjacent to her coast; England, the 'narrow seas,' and in fact the whole stretch of seas from Stadland

**Mare Clausum  
and Mare  
Liberum.**

in Norway to Cape Finisterre in Spain; Denmark claimed the entire stretch between Iceland and Norway, and she and Sweden together claimed jurisdiction over the Baltic.

But these states proved to be merely amateurs in their assertions of jurisdiction over the seas, for Portugal claimed jurisdiction over the Indian Ocean and the seas traversed by ships in sailing over the route around the Cape of Good Hope; and Spain, with her accustomed modesty, intimated a willingness to be satisfied with exclusive jurisdiction over the Gulf of Mexico and the Pacific.

Claims of Spain  
and Portugal.

As might be expected, this view soon began to clash with the growth of commerce. As the legal champion of a freer commerce, Grotius wrote his *Mare Liberum*, which he published in 1609. This was a reassertion of the old Roman principle that the sea, in common with the air, is not subject to dominion and hence there can be no property in it. Both are by nature and must continue *res communes*. The grant, by Pope Alexander VI, of exclusive jurisdiction to Spain and Portugal over the waters of the Atlantic and Pacific, he looked upon as null for the reason that it was a grant of something no one did or could have a title to. Grotius so far modified this sweeping form of the doctrine as to allow of a qualified property right over marginal waters and narrow bays. When Grotius wrote his *Mare Liberum* he was advocating a principle which was contrary to the usage of the time in which he was writing, but his ideas accorded so well with the necessities of a rapidly growing commercial intercourse that they triumphed over both the narrow selfishness of the time and the ultra conservatism of strict adherence to precedent. His doctrine is now one of the best settled principles of international law. Yet this triumph was not without a struggle.

*Mare Liberum*  
of Grotius.

The theory of exclusive jurisdiction over the sea found a champion in Selden, an Englishman, who published his

Selden's Mare  
Clausum.

Mare Clausum in 1835. His theory did not lack precedents upon which to rest; but, owing to the developments in the New World and in the Orient, conditions were so changed as to rob those precedents of their value. It is not a little strange that this doctrine should have found its champion in England, and that England, whose very life depended upon commerce, should have been the most tenacious adherent to the doctrine.

Behring Sea  
controversy.

Though the United States never advocated the doctrine of Mare Clausum in its general form, it did claim that as owner of the Pribyloff islands we had certain rights of control over the seal fisheries in the surrounding sea. These special rights rested upon the peculiar nature of seals. We contended that the seal is not entirely *ferae naturae*, but is in part domesticated as is the honey bee, and as the seals were fed upon the Pribyloff islands we had such a property right in them as to entitle us to protect them even when at a considerable distance from the islands. That such a right is necessary in order to prevent the early destruction of the whole seal herd, no one could deny. But the arbitrators decided against us. Our claim to exclusive jurisdiction over Behring Sea as assignee of Russia would not hold. For, while Russia transferred to us all her rights, among which was what she claimed to be her right to exclusive jurisdiction, the fact was that she had no such right. She could therefore convey to us no title which she did not possess. It is true that her claim had never been seriously disputed, but this was because the interests of other nations had never led to any conflict about it. Such sufferance could not be held to perfect a title which was illegal in its inception.

The remnant of the dispute as to Mare Clausum and Mare Liberum which we have left is now confined to marginal waters and rivers. That the jurisdiction of a state over its marginal waters rests upon international rather than

municipal law seems to admit of little doubt, the English decision in the case of *Queen v. Keyn* to the contrary notwithstanding. As to the existence of the right to exercise such jurisdiction there is no room for doubt. It is a necessity for self-protection and the enforcement of revenue laws. The room for dispute is as to the extent of it. For a long time there was a deplorable lack of definiteness as to its extent. Grotius came no nearer an accurate definition of the extent of such jurisdiction than to say that a state may exercise jurisdiction over certain portions of the sea, provided they are not such as are "too large to appear a part of the land." (*De Jure Belli ac Pacis* II, ch. 3, Sec. 3.) Vattel was a trifle more definite, yet he went no further than to say that "the dominion of a state over the neighboring sea extends as far as her safety renders it necessary and her power is able to assert it; since, on the one hand, she cannot appropriate to herself a thing that is common to all mankind, such as the sea, except so far as she has need of it for some lawful end, and, on the other, it would be a vain and ridiculous pretension to claim a right which she was wholly unable to assert." (*Law of Nations* I, ch. 33, Sec. 289.)

The first statement of the rule as to marginal waters which was at all definite was that of Bynkershoek: "Terrae potestas finitur ubi finitur armorum vis." (*De Dominio Maris*, ch. II.) And as at that time the effective range of arms was about a marine league that distance was fixed upon as the width of the zone of adjacent sea within which a state might exercise territorial jurisdiction. Neither has that limit ever been changed. That there is now a necessity for widening the zone seems to be amply clear. With the rapid increase of the effective range of fire-arms there is the same reason for an increase of the distance as there is for the existence of the rule at all. As no one state can arbitrarily change the recognized

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over marginal  
waters.

Three mile rule.

limit, this is clearly a proper matter for agreement by an international conference.

**Narrow bays,  
etc.**

As to narrow gulfs and bays which run far inland there is not at present universal agreement as to what rule should govern. If the water is not more than two marine leagues wide from low-water mark to low-water mark, then there is no difference of opinion as it is undoubtedly subject to territorial jurisdiction. But when wider than this, there are many who claim that the line marking the limit of territorial jurisdiction should be drawn from headland to headland, instead of following the sinuosities of the coast at the distance of a marine league from it. Though in the case of certain bays, as for instance Chesapeake, the former rule would seem to be supported by the better reason, the latter rule is at present supported by the great weight of authority and may be safely said to be the law.

**Exception to  
three mile rule.**

When it seems necessary for the purpose of protecting health, and in some cases for enforcing revenue laws, states have exercised jurisdiction beyond the limit of a marine league and such acts have been sanctioned by the Supreme Court of the United States. (*Hudson v. Guestier*, 6 Cranch, 282.) But it is very doubtful if such acts are within the strict international rights of a nation. They must find their justification outside the fixed rules of international law, namely, in the law of self-preservation.

**Dispute between  
Gt. Br. and U. S.  
over fisheries.**

The right to catch or dry fish within the territorial waters of another state rests upon treaty. The fishery question has occasioned no small amount of friction between the United States and Great Britain. By the treaty of 1783 the citizens of the United States were given an equal right with the subjects of Great Britain of fishing on the banks of Newfoundland, the coast of Newfoundland, the Gulf of St. Lawrence, and on the coasts, bays and creeks of all other British dominions in America, with privilege to dry and cure the fish in any of the unsettled harbors,

bays and creeks of Nova Scotia, the Magdalen Islands, and Labrador, so long as those places remained unsettled. These rights were not expressly renewed by the treaty of 1814 and it was claimed by Great Britain that they were abrogated by the war. The United States claimed that they were not, and the matter was made the subject of a special convention in 1818, which modified to some extent the original provisions. Further modifications were made in 1854, '71 and '85. We are now back to the old basis of 1818.

The jurisdiction of a state over its navigable rivers has occasioned considerable dispute. With reference, however, to rivers wholly within the territory of a state there is <sup>Navigable</sup> little, if any, room for question, it being generally conceded <sup>rivers.</sup> that over such the state within whose territory they are may exercise exclusive jurisdiction. Though Bluntschli held that "navigable streams in communication with the open sea are, in time of peace, open to the navies of the world." But with reference to navigable rivers which separate two states or flow from one state into another, the matter has not always been so clear. The greatest dispute being with reference to rivers which flow from a state or states into another. The state or states upon the upper course of such a river have usually contended for the right to navigate it to its mouth. Such was the contention of the United States when Spain owned the territory along the lower course of the Mississippi. President Jefferson contended that the outlet to the sea was, under such circumstances, a natural right. So great was the necessity, upon the part of the settlers of the Ohio Valley, for navigating the Mississippi to its mouth, that it is hard to say what solution might have been reached, had not the United States secured possession of the territory at the mouth of the river. <sup>Jefferson's</sup> Jefferson's contention, however plausible, was not <sup>view.</sup> in accord with international law. Our right was a moral

not a legal one. To have forced our way through the territory of another would have been a breach of law, as international law had not reached so advanced a stage in development. So great a change had come about in a little over half a century that Field felt warranted in stating the rule of the future as follows: "A nation and its members, through the territories of which runs a navigable river, have the right to navigate the river to and from the high seas, even though passing through the territory of another nation, subject, however, to the right of the latter nation to make necessary or reasonable police regulations for its own peace and safety." (Outlines of International Code, sec. 55.)

**St. Lawrence.**

The right to navigate the St. Lawrence was for a long time in dispute. The United States felt that as Great Britain had felt warranted in claiming the right to navigate the Mississippi merely upon the suspicion that it took its rise in British territory, she should not deny the United States the right when it was a certainty that the latter possessed half of four lakes and all of a fifth which emptied into the river and furthermore owned one bank of the river for a considerable distance. The dispute was quieted temporarily by the reciprocity treaty of 1854, but was not settled until 1871, when by treaty the United States was conceded the right "forever" to freely navigate the stream. By the same treaty the rivers of Alaska were opened to the free navigation of British and American citizens alike.

**Navigation of  
European  
rivers.**

Europe, also, has had its share of disputes over the right to navigation of rivers. By the treaty of Westphalia the navigation of the river Scheldt was closed against the Spanish Netherlands and remained so until it was forcibly opened in 1792. By the convention of Rastadt, 1804, the tolls collected for the privilege of navigating the Rhine were abolished. By the Congress of Vienna provision was



made confirming the free navigation of the Rhine as to "its whole course, from the point where it becomes navigable to the sea, ascending or descending." Similar provisions were contained in the Treaty, or Final Act, with reference to the Scheldt, the Neckar, the Main, the Moselle and the Meuse. In 1821, a commission appointed for the purpose agreed upon a provision for the free navigation of the Elbe. By the conference of Paris, 1856, the last of the great interstate rivers of Europe was opened to free navigation. In all these cases tolls may be charged covering the cost of keeping the river navigable.

The old doctrine of exclusive rights was maintained with reference to South American rivers up to the middle of the last century, when it was done away with by treaties and a decree of the Emperor of Brazil. The free navigation of the Congo and the Niger was provided for under an international guarantee by the Conference of 1885.

For certain purposes the criminal jurisdiction of a state extends over the high seas. By all it is admitted that it is so extended for the purpose of punishing piracy. And by some it has been contended that it is so extended for the purpose of punishing any who may be engaged in the slave trade. This latter contention is not correct, unless the country whose citizens are found engaged has by statute made the trade piracy, and further the right of visit and search on the high seas for the purpose of determining whether or not the vessel is engaged in the slave trade does not exist in time of peace, unless provided for by treaty between the states concerned. (Opinion of Lord Stowell in the case of the *Louis*, 2 Dodson's Admiralty Reports, 210, and of Justice Marshall in the case of the *Antelope*, 10 Wheaton, 66-132.)

A merchant vessel is subject to the jurisdiction of the country in whose ports or territorial waters it chances to be, *i.e.*, it is not exempt from local jurisdiction, as is a

**Jurisdiction  
over merchant  
vessels.**

public vessel. But when upon the high seas it is subject to the jurisdiction of the state whose nationality it bears. This does not mean that for all purposes it is to be considered a part of the soil of said state, which has at times been contended. It means simply that, as each state has like jurisdiction with any other state over the high seas, the fact of nationality of the vessel is sufficient to turn the scale in favor of the state whose nationality it bears. Upon this point, John Hay said in his instructions to Mr. Lowell, our minister at the Court of St. James:—

**Case of John  
Anderson.**

“ I enclose herewith a copy of a dispatch recently received from A. C. Litchfield, Esq., consul-general of the United States at Calcutta, in relation to the case of one John Anderson, an ordinary seaman on board the American bark C. O. Whitmore, who, it appears, stabbed and killed the first officer of the ship on the 31st of January last, while that vessel was on her way from New York to Calcutta, sixteen days from her port of departure, and on the high seas in latitude 25° 35' N. and longitude 35° 50' W.

“ You will perceive that the consul-general invoked the aid of the local police authorities in securing the safe custody of the accused, who was the prisoner of the United States, until he could complete the necessary arrangements for sending him to his country for trial, against whose municipal laws only he was accused of having offended, and that while thus in the temporary custody of the local police, the colonial authorities took judicial cognizance of the matter, claiming under the advice of the advocate-general of the colony, that under a colonial statute, which confers upon the courts of the colony jurisdiction of crimes committed by a British subject on the high seas, even though such crimes be committed on the ship of a foreign nation, and that inasmuch as the accused although appearing on the ship's articles under the name of John Anderson, subject of Sweden, had declared that his real

name was Alfred Hussey, and that he was a native of Liverpool and therefore a British subject, the case came within the jurisdiction of those courts.

“ The matter is now believed to have reached that point in the judicial proceedings where effective measures for asserting the jurisdictional rights of the United State would be unavailable in this particular case. And whilst I entertain no doubt that the accused will receive as fair a trial in the high court of Calcutta, where it is understood he is to be tried, as he would in the court of the United States, in which tribunal he would be arraigned were he sent here for trial, I deem it proper at the same time to instruct you to bring the question to the attention of Her Majesty's Government, in order to have it distinctly understood that this case cannot be admitted by this Government as a precedent for any similar cases that may arise in the future. No principle of public law is better understood nor more universally recognized than that merchant vessels on the high seas are under the jurisdiction of the nation to which they belong, and that, as to common crimes committed on such vessels while on the high seas, the competent tribunals of the vessels' nation have exclusive jurisdiction of the questions of trial and punishment of any person thus accused can have no more to do with the question of jurisdiction than it would had he committed the same crime within the geographical territorial limits of the nation against whose municipal law he offends. The merchant ship while on the high seas, is, as the ship of war everywhere, a part of the territory of the nation to which she belongs.

“ I pass over the apparent breach of comity in the proceeding of the colonial officials as being rather the result of inadvertence and possible misconception on the part of the Government law officer of the colony, than any design to question the sovereignty of the United States in this or cases of a similar nature.”

“ I have to acknowledge the receipt of your dispatch No. 17, of the 16th ultimo, inclosing a copy of the correspondence between your legation and the foreign office in relation to the case of John Anderson, who was tried in Calcutta for a crime alleged to have been committed on board a vessel of the United States on the high seas, which correspondence contains an expression of the regret of Her Majesty's Government that the action of the authorities at Calcutta in the case in question, should have been governed by a view of the law which, in the opinion of Her Majesty's Government, cannot be supported.

“ In reply I have to instruct you to convey to the proper quarter an expression of this Department's appreciation of the candor and goodwill with which Her Majesty's Government has considered this matter, and I say, moreover, that it has afforded this government great satisfaction to learn that the action of the authorities of Calcutta in the case of Anderson is to be attributed to a misconception, and not to any design to question the jurisdiction of the United States in that or any similar case.” (Mr. Hay to Mr. Lowell, July 7, 1880.)

**Extraterritorial  
jurisdiction.**

How far a state may in other cases extend its criminal jurisdiction for the purpose of punishing crimes not committed within its own borders has been and is yet a disputed question. We have already referred to the claim of those nations whose jurisprudence is founded upon Roman Law to the right of trying and punishing their own citizens for crimes committed by them abroad. But some go farther than this and claim the right to punish foreigners, when found within their territory, who have committed crimes against the safety of the state, and still others go farther and claim a like right over the foreigners who have committed a crime or crimes against their citizens, though such crime, or crimes, were committed outside the territory of the state claiming the right to punish. In the first

class are Germany, France, Spain, Belgium, and Switzerland; in the second, Russia, The Netherlands, and Greece. About midway between these stand Austria and Italy, which claim the right to punish foreigners for crimes committed abroad against their citizens, but only after offering to give the criminal up to the state in which the crime has been committed, and the latter refuses to take cognizance of the crime.

The view of the United States as to the right of another state to punish our citizens for crime committed upon our territory is well expressed in the Cutting Case, the facts of which are, briefly, as follows: On June 18th, 1886, Mr. A. K. Cutting, a citizen of the United States, published in a newspaper of El Paso, Texas, a card "commenting on certain proceedings of Emigdio Medina, a citizen of Mexico." Later in the same month Mr. Cutting crossed over into Mexico and was imprisoned at El Paso del Norte, Mexico, upon a charge of criminal libel. The state claimed the right to proceed under the provisions of paragraph 186 of the Mexican Penal Code, which conferred jurisdiction upon the criminal courts of Mexico to try and punish offenses against Mexican citizens committed by foreigners in foreign territory. Upon signing a "reconciliation," the prosecution was withdrawn and he was allowed to return to the United States, where, the feeling of freedom getting the better of his discretion, he published a card in the *Centinela*, the same paper in which his previous card had appeared, reiterating the previous charges and adding to them others to the effect that Medina's conduct was "contemptible and cowardly." Again he returned to Mexican territory, was arrested, tried, convicted and sentenced to one year's imprisonment at hard labor and fined \$600.00. The case was appealed to the Supreme Court of the State of Chihuahua, which affirmed the sentence of the lower court, but released the prisoner, on the ground that

The Cutting  
case.

the plaintiff had withdrawn from the suit. In the meantime, the United States had intervened, through its minister, for the protection of its citizen. Our government instructed its minister that as "the paper was not published in Mexico, and the proposition that Mexico can take jurisdiction of its author on account of its publication in Texas is wholly inadmissible and is peremptorily denied by this Government. It is equivalent to asserting that Mexico can take jurisdiction over the authors of the various criticisms of Mexican business operations which appear in the newspapers of the United States. If Mr. Cutting can be tried and imprisoned in Mexico for publishing in the United States a criticism on a Mexican business transaction in which he was concerned, there is not an editor or publisher of a newspaper in the United States who could not, were he found in Mexico, be subjected to like indignities and injuries on the same ground. To an assumption of such jurisdiction by Mexico neither the Government of the United States nor the governments of our several States will submit. They will each mete out due justice to all offenses committed in their respective jurisdictions. They will not permit that this prerogative shall in any degree be usurped by Mexico, nor, aside from the fact of the exclusiveness of their jurisdiction over acts done within their own boundaries, will they permit a citizen of the United States to be called to account by Mexico for acts done by them within the boundaries of the United States. On this ground, therefore, you will demand Mr. Cutting's release.

"But there is another ground on which this demand may with equal positiveness be based. By the law of nations no punishment can be inflicted by a sovereign on citizens of other countries unless in conformity with those sanctions of justice which all civilized nations hold in common.

“ Among these sanctions are the right of having the facts on which the charge of guilt was made examined by an impartial court, the explanation to the accused of these facts, the opportunity granted to him of counsel, such delay as is necessary to prepare his case, permission in all cases not capital to go at large on bail till trial, the due production under oath of all evidence prejudicing the accused, giving him the right to cross-examination, the right to produce his own evidence in exculpation, release even from temporary imprisonment in all cases where the charge is simply one of threatened breach of the peace, and where due security to keep the peace is tendered. All these sanctions were violated in the present case. Mr. Cutting was summarily imprisoned by a tribunal whose partiality and incompetency were alike shown by its proceedings. He was refused counsel; he was refused an interpreter to explain to him the nature of the charges brought against him; if there was evidence against him it was not produced under oath, with an opportunity given him for cross-examination: bail was refused to him; and after a trial, if it can be called such, violating, in its way, the fundamental sanctions of civilized justice, he was cast into a “loathsome and filthy” cell, where he still languishes, and this for an act committed in the United States, and in itself not subject to prosecution in any humane system of jurisprudence, and after a trial violating the chief sanctions of criminal procedure.

“These circumstances you will state as giving an additional basis, a basis which if it be established this Government will not permit to be questioned for the demand for Mr. Cutting’s immediate release.” (Foreign Relations 1886, p. 701.)

This communication sets forth clearly the doctrine as to the territoriality of crime and is in this respect a sound statement of international law. But with reference to the

form of trial, if in accordance with the laws of Mexico, we had no legal ground of complaint, as Mexico was a member of the family of nations and as such had the right to determine upon her own rules of criminal procedure. This, however, was not an essential point. The controlling point in the case is the question of the jurisdiction of the Mexican courts to try him at all. This being determined in the negative, it is not necessary to consider other matters. The argument of our government on the question of jurisdiction was sufficiently convincing so that Mr. Cutting was released.

**Consular  
jurisdiction.**

In countries not yet admitted to the family of nations, it is usual for states to exercise what is known in international law as consular jurisdiction. In accordance with which the consul exercises jurisdiction in cases to which a citizen of his own state is a party, unless the other party chances to be a citizen of some other state belonging to the family of nations, in which case the matter is regulated by treaty between the states concerned. The chief countries in which consular jurisdiction is still maintained are: China, Egypt, and Persia. Consular jurisdiction in Japan was abolished in 1901. It is an unwieldy and expensive method of administering justice, for, as there are but few consuls in a country, the distances which litigants must come is frequently very great. But what makes it particularly irksome is that it is a vote of lack of confidence in the ability of the courts of the country to administer fair and impartial justice. Though usually resented by the country over which it is exercised, it is frequently retained longer than is really necessary. Such was no doubt true in the case of Japan, whose increased fighting ability, more than improvement in her jural system, secured its relinquishment. It is seldom all relinquished at one time, but is gradually pared down by treaty until there is finally little left, which remnant is relinquished



with a great flourish. The formal relinquishment of consular jurisdiction is the last step in the reception of non-Christian nations into the full fellowship of the family of nations.

THE QUEEN *v.* KEYN.

(Court of Crown Cases Reserved, 1876.)

JURISDICTION TO TRY CRIMES COMMITTED WITHIN MARGINAL WATERS.

This is a case in which a foreigner on the *Franconia* killed a British subject within two and one-half miles of Dover Beach. Chief Justice Cockburn delivered the opinion of the court.

Cockburn, C. J. "The question is, whether the accused is amenable to our law, and whether there was jurisdiction to try him?

"The legality of conviction is contested, on the ground that the accused is a foreigner; that the *Franconia*, the ship he commanded, was a foreign vessel, sailing from a foreign port, bound on a foreign voyage; that the alleged offense was committed on the high seas. Under these circumstances, it is contended that the accused, though he may be amenable to the law of his own country, is not capable of being tried and punished by the law of England.

"The facts on which this defense is based are not capable of being disputed; but a twofold answer is given on the part of the prosecution: 1st. That, although the occurrence on which the charge is founded took place on the high seas in the sense that the place in which it happened was not within the body of a country, it occurred within three miles of the English coast; that by the law of nations, the sea, for a space of three miles from the coast, is a part of the territory of the country to which the country belongs; that, consequently, the *Franconia*,

at the time the offense was committed, was in English waters, and those on board were therefore subject to English law.

“Secondly. That, although the negligence of which the accused was guilty occurred on board a foreign vessel, the death occasioned by such negligence took place on board a British vessel; and that, as a British vessel is, in point of law, to be considered British territory, the offense, having been consummated by the death of the deceased in a British ship, must be considered as having been committed on British territory.

“According to the general law, a foreigner who is not residing permanently or temporarily in British territory, or on board a British ship, cannot be held responsible for an infraction of the law of this country.

“Unless, therefore, the accused, Keyn, at the time the offense of which he has been convicted was committed, was on British territory or on board a British ship, he could not be properly brought to trial under British law, in the absence of express legislation.

“In the reign of Charles II., Sir Leoline Jenkins, then the Judge of the Court of Admiralty, in a charge to the grand jury at an Admiralty session at the Old Bailey, not only asserted the king's sovereignty within the four seas, and that it was his right and province, ‘to keep the public peace on these seas,’ —that is, as Sir Leoline expounds it, ‘to preserve his subjects and allies in their possessions and properties upon the seas, and in all freedom and security to pass to and fro on them, upon their lawful occasion,’ but extended this authority and jurisdiction of the King. ‘To preserve the public peace and to maintain the freedom and security of navigation all the world over; so that not the utmost bound of the Atlantic Ocean, nor any corner of the Mediterranean, nor any part of the South or other seas, but that if the peace of God and the King be violated upon

any of his subjects, or upon his allies or their subjects, and the offender be afterwards brought up or laid hold of in any of his Majesty's ports, such breach of the peace is to be inquired of and tried in virtue of a commission of oyer and terminer as this is, in such county, liberty, or place as His Majesty shall please to direct—so long an arm hath God by the laws given to his vicegerent the King.'

"Venice, in like manner, laid claim to the Adriatic, Genoa to the Ligurian Sea, Denmark to a portion of the North Sea.

"The Portuguese claimed to bar the ocean route to India and the India Sea to the rest of the world, while Spain made the like assertion with reference to the West.

"All these vain and extravagant pretensions have long since given way to the influence of reason and common sense.

"If, indeed, the sovereignty thus asserted had a real existence and could now be maintained, it would, of course, independently of any question as to the three-mile zone, be conclusive of the present case. But the claim of such sovereignty, at all times unfounded, has long since been abandoned. No one would now dream of asserting that the sovereign of these realms has any greater right over the surrounding seas than the sovereigns on the opposite shores; or that it is the especial duty and privilege of the Queen of Great Britain to keep the peace in these seas; or that the Court of Admiralty could try a foreigner for an offense committed in a foreign vessel in all parts of the Channel.

"No writer of our day, except Mr. Chitty in his treatise on the prerogative, has asserted the ancient doctrine. Blackstone, in his chapter on the prerogative in the Commentaries, while he asserts that the narrow seas are part of the realm, puts it only on the ground that the jurisdiction of the Admiralty extends over these seas.

"He is silent as to any jurisdiction over foreigners

within them. The consensus of jurists, which has been so much insisted on as authority, is perfectly unanimous as to the non-existence of any such jurisdiction. Indeed, it is because this claim of sovereignty is admitted to be untenable that it has been found necessary to resort to the theory of the three-mile zone.

“It is in vain, therefore, that the ancient assertion of sovereignty over the narrow seas is invoked to give countenance to the rule now sought to be established, of jurisdiction over the three-mile zone.

“If this rule is to prevail, it must be on altogether different grounds. To invoke, as its foundation or in its support, an assertion of sovereignty which, for all practical purposes, is, and always has been, idle and unfounded, and the validity of which renders it necessary to have recourse to the new doctrine, involves an inconsistency, on which it would be superfluous to dwell. I must confess myself unable to comprehend how, when the ancient doctrine as to sovereignty over the narrow seas is adduced, its operation can be confined to the three-mile zone. If the argument is good for anything it must apply to the whole of the surrounding seas. But the counsel for the Crown evidently shrank from applying it to this extent. Such a pretension would not be admitted or endured by foreign nations. That it is out of this extravagant assertion of sovereignty that the doctrine of the three-mile jurisdiction, on the part of the Crown, and which, the older claim being necessarily abandoned, we are now called upon to consider, has sprung up, I readily admit.

“With the celebrated work of Grotius, published in 1609, began the great contest of the jurists as to the freedom of the seas. The controversy ended, as controversies often do, in a species of compromise. While maintaining the freedom of the seas, Grotius, in his work *De Jure Belli et Pacis*, had expressed an opinion that,

while no right could be acquired to the exclusive possession of the ocean, an exclusive right or jurisdiction might be acquired in respect of particular portions of the sea adjoining the territory of individual states.

“Other writers adopted a similar principle, but with very varying views as to the extent to which the right might be exercised. Albericus Gentilis extended it to 100 miles: Baldus and Bodinus to sixty.” Loccenius (*De Jure Maritimo*, ch. iv., s. 6) puts it at two days sail; another writer makes it extend as far as could be seen from the shore. Valin, in his *Commentary on the French Ordinances of 1681* (ch. v.), would have it reach as far as bottom could be found with the lead line.

“Differing altogether from these writers as to the extent of maritime sovereignty, Bynkershoek, an advocate, like Grotius, for the *mare liberum*, and who entered the lists against Selden as to the dominion of England in the so-called English Sea, in his treatise *De Dominio Maris*, published in 1702, follows up the idea of Grotius as to a limited dominion of the sea from the shore.

“After combating the doctrine of a *mare clausum* as regards the sea at large, and enumerating these inconsistent opinions, which he seems little disposed to respect, Bynkershoek continues: ‘*Hinc videas priscos juris magistros, qui dominium in mare proximum ausi sunt agnoscere, in regundis ejus finibus admodum vagari incertos.*’ ‘*Quare omnino videtur rectius,*’ he adds, after disposing of the foregoing opinions. ‘*Eo potestatem terrae extendi, quousque tormenta exploduntur; eatenus quippe, cum imperare, tum possidere videmur. Loquor autem de his temporibus; quibus illis machinis utimur; alioquin generaliter decendum esset, potestatem terrae finire, ubi finitur armorum vis; etenim haec, ut diximus, possessionem tuetur.*’

“We have here, for the first time, so far as I am aware, a suggestion as to a territorial dominion over the sea,

extending as far as cannon-shot would reach — a distance which succeeding writers fixed at a marine league, or three miles. Prior to this, no one had suggested such a limit.

“The jurisdiction, assumed in the admiralty commissions, or exercised by the Court of King’s Bench in the time of the Edwards, was founded on the King’s alleged sovereignty over the whole of the narrow seas; it had no reference whatever to any notion of a territorial sea. To English lawyers the idea of this limited jurisdiction was utterly unknown.

“With Selden and Hale, they stood up stoutly for the King’s undivided dominion over the four seas. No English author makes any distinction, as regards the dominion of the Crown, between the narrow seas as a whole and any portion of them as adjacent to the shore. The doctrine was equally unknown to the Scotch lawyers.

“Even to our times the doctrine of the three-mile zone has never been adopted by the writers on English law. To Blackstone who, in his Commentaries, treats of the sea with reference to the prerogative, as also to his modern editor, Mr. Stephen, it is unknown; equally so to Mr. Chitty, whose work on the prerogative is of the present century. It was not till the beginning of this century that any mention of such a doctrine occurs in the courts of this country. But to the continental jurists, the suggestion of Bynkershoek seemed a happy solution of the great controversy as to the freedom of the sea; and the formula, *potestas finitur ubi finitur armorum vis*, was a taking one; and succeeding publicists adopted and repeated the rule which their predecessors had laid down, without much troubling themselves to ascertain or inquire whether that rule had been recognized and adopted by the maritime nations who were to be affected by it.

“Let us look a little more closely into both.

“First, then, let us see how the matter stands, as regards

treaties. It may be asserted, without fear of contradiction, that the rule that the sea surrounding the coast is to be treated as a part of the adjacent territory, so that the state shall have exclusive dominion over it, and that the law of the latter shall be generally applicable to those passing over it in the ships of other nations, has never been made the subject-matter of any treaty, or, as matter of acknowledged right, has formed the basis of any treaty, or has ever been the subject of diplomatic discussion. It has been entirely the creation of the writers of international law. It is true that the writers who have been cited, constantly refer to treaties in support of doctrines they assert. But when the treaties they refer to are looked at, they will be found to relate to two subjects only — the observance of the rights and obligations of neutrality, and the exclusive right of fishing. In fixing the limits to which these rights should extend, nations have so far allowed the writers on international law to adopt the three mile range as a convenient distance. There are several treaties by which nations have engaged, in the event of either of them being at war with a third, to treat the sea within three miles of each other's coasts as neutral territory, within which no warlike operations should be carried on; instances of which will be found in the various treatises on international law. Thus, for instance, in the treaties of commerce, between Great Britain and France, of September, 1786; between France and Russia of January, 1787; between Great Britain and the United States, of October, 1794, each contracting party agrees, if at war with any other nation, not to carry on hostilities within cannon shot of the coast of the other contracting party; or if the other should be at war, not to allow its vessels to be captured within the like distance. There are many other treaties of like tenor, a list of which is given by Azuni (vol. 11, p. 78); and various ordinances and laws have been made by the different states in order to give effect to them.

“Again, nations, possessing opposite or neighboring coasts, bordering on a common sea, have sometimes found it expedient to agree that the subjects of each shall exercise an exclusive right of fishing to a given distance from their own shores, and here also have accepted the three miles as a convenient distance. Such, for instance, are the treaties made between this country and the United States, in relation to the fisheries off the coast of Newfoundland, and those between this country and France, in relation to the fishery on their respective shores; and local laws have been passed to give effect to these engagements.

“But in all these treaties this distance is adopted, not as a matter of existing right established by the general law of nations, but as a matter of mutual concession and convention. Instead of upholding the doctrine contended for, the fact of these treaties having been entered into has rather the opposite tendency; for it is obvious that, if the territorial right of a nation bordering on the sea to this portion of the adjacent waters had been established by the common assent of nations, these treaty arrangements would have been wholly superfluous.

“Each nation would have been bound, independently of treaty engagement, to respect the neutrality of the other in these waters as much as in its inland waters. The foreigner invading the rights of the local fishermen would have been amenable, consistently with international law, to local legislation prohibiting such infringement, without any stipulation to that effect by treaty. For what object, then, have treaties been resorted to? Manifestly in order to obviate all questions as to concurrent or conflicting rights arising under the law of nations.

“Possibly, after these precedents and all that has been written on this subject, it may not be too much to say that, independently of treaty, the three-mile belt of sea might at this day be taken as belonging for these purposes, to the local state.



“But it is scarcely logical to infer, from such treaties alone, that, because nations have agreed to treat the littoral sea as belonging to the country it adjoins, for certain specified objects, they have therefore assented to forego all other rights previously enjoyed in common, and have submitted themselves, even to the extent of the right of navigation on a portion of the high seas, and the liability of their subjects therein to the criminal law, to the will of the local sovereign, and the jurisdiction of the local state. Equally illogical is it, as it seems to me, from the adoption of the three-mile distance in these particular instances, to assume, independently of everything else, a recognition, by the common assent of nations, of the principle that the subjects of one state passing in ships within three miles of the coast of another, shall be in all respects subject to the law of the latter. It may be that the maritime nations of the world are prepared to acquiesce in the appropriation of the littoral sea; but I cannot think that these treaties help us much towards arriving at the conclusion that this appropriation has actually taken place. At all events, the question remains, whether judicially we can infer that the nations who have been parties to these treaties, and, still further, those who have not, have thereby assented to the application of the criminal law of other nations to their subjects on the waters in question, and on the strength of such inference to apply the criminal law of this country.

“The uncertainty in which we are left, so far as judicial knowledge is concerned, as to the extent of such assent, likewise presents, I think, a very serious obstacle to our assuming the jurisdiction we are called upon to exercise, independently of the, to my mind, still more serious difficulty, that we should be assuming it without legislative warrant.

“So much for treaties. Then how stands the matter as to usage, to which reference is so frequently made by the publicists in support of their doctrine?

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“When the matter is looked into, the only usage found to exist is such as is connected with navigation, or with revenue, local fisheries, or neutrality, and it is to these alone that the usage relied on is confined. Usage as to the application of the general law of the local state to foreigners on the littoral sea, there is actually none. No nation has arrogated to itself the right of excluding foreign vessels from the use of its external littoral waters for the purpose of navigation, or has assumed the power of making foreigners in foreign ships passing through these waters subject to its law, otherwise than in respect of the matters to which I have just referred. Nor have the tribunals of any nation held foreigners in these waters amenable generally to the local criminal law in respect of offenses. It is for the first time in the annals of jurisprudence that a court of justice is now called upon to apply the criminal law of the country to such a case as the present.

“It may well be said, I say again, that — after all that has been said and done in this respect — after the instances which have been mentioned of the adoption of three-mile distance, and the repeated assertion of this doctrine by the writers on public law, a nation which should now deal with this portion of the sea as its own, so as to make foreigners within it subject to its law, the prevention and punishment of offenses, would not be considered as infringing rights of other nations. But I apprehend that as the ability so to deal with these waters would result, not from any original or inherent right, but, from the acquiescence of other states, some outward manifestation of the national will, in the shape of open practice or municipal legislation, so as to amount, at least constructively, to an occupation of that which was before unappropriated, would be necessary to render the foreigner, not previously amenable to our general law, subject to its control.

THE BELGENLAND.

(114 U. S. 355.)

JURISDICTION IN CASES OF COLLISION ON THE HIGH SEAS.

This case grew out of a collision which took place on the high seas between the Norwegian bark *Luna* and the Belgian steamship *Belgenland*, by which the former was run down and sunk. A part of the crew of the *Luna*, including the master, were rescued by the *Belgenland* and brought to Philadelphia. The master immediately libeled the steamship on behalf of the owners of the *Luna* and her cargo, and her surviving crew, in a cause civil and maritime.

Mr. Justice Bradley delivered the opinion of the court. He stated the facts in the foregoing language, and continued:—

The first question to be considered is that of the jurisdiction of the District Court to hear and determine the cause.

It is unnecessary here, and would be out of place, to examine the question which has so often engaged the attention of the common law courts, whether, and in what cases, the courts of one country should take cognizance of controversies arising in a foreign country, or in places outside of the jurisdiction of any country. It is very fully discussed in *Mostyn v. Fabrigas*, Cowp. 161, and the notes thereto in 1 Smith's Leading Cases, 340; and an instructive analysis of the law will be found in the elaborate arguments of counsel in the case of the *San Francisco Vigilant Committee*, *Malony v. Dows*, 8 Abbott Pr. 316, argued before Judge Daly in New York, 1859. We shall content ourselves with inquiring what rule is allowed by Courts of Admiralty in dealing with maritime causes arising between foreigners on the high seas.

This question is not a new one in these courts. Sir William Scott had occasion to pass upon it in 1799. An American ship was taken by the French on a voyage from Philadelphia to London, and afterwards rescued by her crew, carried to England, and libeled for salvage; and the court entertained jurisdiction. The crew, however, though engaged in the American ship, were British born subjects, and weight was given to this circumstance in the disposition of the case. The judge, however, made the following remarks: "But it is asked, if they were American seamen would this court hold plea of their demands? It may be time enough to answer this question whenever the fact occurs. In the meantime, I will say without scruple that I can see no inconvenience that would arise if a British court of justice was to hold plea in such a case; or conversely, if American courts were to hold pleas of this nature respecting the merits of British seamen on such occasions. For salvage is a question of *jus gentium*, and materially different from the question of a mariner's contract, which is a creature of the particular institutions of the country, to be applied and construed and explained by its own particular rules. There might be good reason, therefore, for this court to decline to interfere in such cases, and to remit them to their own domestic forum; but this is a general claim, upon the general ground of *quantum meruit*, to be governed by a sound discretion, acting on general principles; and I can see no reason why one country should be afraid to trust to the equity of the courts of another on such a question, of such a nature, so to be determined." The Two Friends, 1 Ch. Rob. 271, 278.

The law has become settled very much in accord with these views. That was a case of salvage; but the same principles would seem to apply to the case of destroying or injuring a ship, as to that of saving it. Both, when acted

on the high seas, between persons of different nationalities, come within the domain of the general law of nations, or *communis juris*, and are prima facie proper subjects of inquiry in any Court of Admiralty which first obtains jurisdiction of the rescued or offending ship at the solicitation in justice of the meritorious or injured parties.

The same question of jurisdiction arose in another salvage case which came before this court in 1804, *Mason v. The Blaireau*, 2 Cranch, 240. There a French ship was saved by a British ship, and brought into a port of the United States; and the question of jurisdiction was raised by Mr. Martin of Maryland, who, however, did not press the point, and referred to the observations of Sir William Scott in *The Two Friends*. Chief Justice Marshall, speaking for the court, disposed of the question as follows: "A doubt has been suggested," said he, "respecting the jurisdiction of the court, and upon a reference to the authorities, the point does not appear to have been ever settled. These doubts seem rather founded on the idea that upon principles of general policy, this court ought not to take cognizance of a case entirely between foreigners, than from any positive incapacity to do so. On weighing the considerations drawn from public convenience, those in favor of the jurisdiction appear much to overbalance those against it, and it is the opinion of this court, that, whatever doubt may exist in a case where the jurisdiction may be objected to, there ought to be none where the parties assent to it." In that case, the objection had not been taken in the first instance, as it was in the present. But we do not see how that circumstance can affect the jurisdiction of the court, however much it may influence its discretion in taking jurisdiction.

For circumstances often exist which render it inexpedient for the court to take jurisdiction of controversies between foreigners in cases not arising in the country of

the forum; as, where they are governed by the laws of the country to which the parties belong, and there is no difficulty in a resort to its courts; or where they have agreed to resort to no other tribunals. The cases of foreign seamen suing for wages, or because of ill-treatment, are often in this category; and the consent of their consul, or minister, is frequently required before the court will proceed to entertain jurisdiction; not on the ground that it has not jurisdiction; but that, from motives of convenience or international comity, it will use its discretion whether to exercise jurisdiction or not; and where the voyage is ended, or the seamen have been dismissed or treated with great cruelty, it will entertain jurisdiction even against the protest of the consul. This branch of the subject will be found discussed in the following cases: *The Catherine*, 1 Pet. Adm. 104; *The Forsoket*, 1 Pet. Adm. 197; *The St. Oloff*, 2 Pet. Adm. 428; *The Golubchick*, 1 W. Rob. 143; *The Nina*, L. R. 2 Adm. and Eccl. 44; *s. c.* on appeal, L. R. 2 Priv. Co. 38; *The Leon XIII.*, 8 Prob. Div. 121; *The Havana*, 1 Sprague, 402; *The Becherdass Ambaidass*, 1 Lowell, 569; *The Pawashick*, 2 Lowell, 142.

Of course, if any treaty stipulations exist between the United States and the country to which a foreign ship belongs, with regard to the right of the consul of that country to adjudge controversies arising between the master and the crew, or other matters occurring on the ship exclusively subject to the foreign law, such stipulations should be fairly and faithfully observed. *The Elwin Kreplin*, 9 Blatchford, 438, reversing *s. c.* 4 Ben. 413; see *s. c.* on application for mandamus, *Ex parte Newman*, 14 Wall. 152. Many public engagements of this kind have been entered into between our government and foreign states. See *Treaties and Conventions*, Rev. Ed. 1873, Index, 1238.

In the absence of such treaty stipulations, however, the



case of foreign seamen is undoubtedly a special one, when they sue for wages under a contract which is generally strict in its character, and framed according to the laws of the country to which the ship belongs; framed also with a view to secure, in accordance with those laws, the rights and interests of the ship-owners as well as those of master and crew, as well when the ship is abroad as when she is at home. Nor is this special character of the case entirely absent when foreign seamen sue the master of their ship for ill-treatment. On general principles of comity, Admiralty courts of other countries will not interfere between the parties in such cases unless there is special reason for doing so, and will require the foreign consul to be notified, and, though not absolutely bound by, will always pay due respect to, his wishes as to taking jurisdiction.

Not alone, however, in cases of complaints made by foreign seamen, but in other cases also, where the subjects of a particular nation invoke the aid of our tribunals to adjudicate between them and their fellow-subjects, as to matters of contract or tort solely affecting themselves and determinable by their own laws, such tribunals will exercise their discretion whether to take cognizance of such matters or not. A salvage case of this kind came before the United States District Court of New York in 1848. The master and crew of a British ship found another British ship near the English coast apparently abandoned (though another vessel was in sight), and took off a portion of her cargo, brought it to New York, and libeled it for salvage. The British consul and some owners of the cargo intervened and protested against the jurisdiction, and Judge Betts discharged the case, delivered the property to the owners upon security given, and left the salvors to pursue their remedy in the English courts. *One Hundred and Ninety-four Shawls*, 1 Abbott, Adm. 317.

So in a question of ownership of a foreign vessel, agitated between the subjects of the nation to which the vessel belonged, the English Admiralty, upon objection being made to its jurisdiction, refused to interfere, the consul of such foreign nation having declined to give his consent to the proceedings. *The Agincourt*, 2 Prob. Div. 239. But in another case, where there had been an adjudication of the ownership under a mortgage in the foreign country, and the consul of that country requested the English court to take jurisdiction of the case upon a libel filed by the mortgagee, whom the owners had dispossessed, the court took jurisdiction accordingly. *The Evangelistria*, 2 Prob. Div. 241, note.

But, although the courts will use a discretion about assuming jurisdiction of controversies between foreigners in cases arising beyond the territorial jurisdiction of the country to which the courts belong, yet where such controversies are *communis juris*, that is, where they arise under the common law of nations, special grounds should appear to induce the court to deny its aid to a foreign suitor when it has jurisdiction of the ship or party charged. The existence of jurisdiction in all such cases is beyond dispute; the only question will be, whether it is expedient to exercise it. See 2 *Parsons Ship. and Adm.* 226, and cases cited in notes. In the case of *The Jerusalem*, 2 Dall. 191, decided by Mr. Justice Story, jurisdiction was exercised in the case of a bottomry bond, although the contract was made between subjects of the Sublime Porte, and it did not appear that it was intended that the vessel should come to the United States. In this case Justice Story examined the subject very fully, and came to the conclusion that, wherever there is a maritime lien on the ship, an Admiralty court can take jurisdiction on the principle of the civil law, that in proceedings *in rem* the proper forum is the *locus rei sitae*. He added: "With reference, therefore,

to what may be deemed the public law of Europe, a proceeding *in rem* may well be maintained in our courts where the property of a foreigner is within our jurisdiction. Nor am I able to perceive how the exercise of such judicial authority clashes with any principles of public policy." That, as we have seen, was a case of bottomry, and Justice Story, in answer to the objection that the contract might have been entered into in reference to the foreign law, after showing that such law might be proven here, said: "In respect to maritime contracts, there is still less reason to decline the jurisdiction, for in almost all civilized countries these are in general substantially governed by the same rules."

Justice Story's decision in this case was referred to by Dr. Lushington with strong approbation in the case of *The Golubchick*, 1 W. Rob. 143, decided in 1840, and was adopted as authority for his taking jurisdiction in that case.

In 1839, a case of collision on the high seas between two foreign ships of different countries (the very case now under consideration) came before the English Admiralty. *The Johann Friederich*, 1 W. Rob. 35. A Danish ship was sunk by a Bremen ship, and on the latter being libeled, the respondents entered a protest against the jurisdiction of the court. But jurisdiction was retained by Dr. Lushington, who, amongst other things, remarked: "An alien friend is entitled to sue (in our courts) on the same footing as a British born subject, and if the foreigner in this case had been resident here, and the cause of action had originated *infra corpus comitatus*, no objection could have been taken." Reference being made to the observations of Lord Stowell in cases of seamen's wages, the judge said: "All questions of collisions are questions *communis juris*; but in case of mariners' wages, whoever engages voluntarily to serve on board a foreign ship, necessarily

undertakes to be bound by the law of the country to which such ship belongs, and the legality of his claim must be tried by such law. One of the most important distinctions, therefore, respecting cases where both parties are foreigners is, whether the case be *communis juris* or not. \* \* \* If these parties must wait until the vessel that has done the injury returned to its own country, their remedy might be altogether lost, for she might never return, and, if she did, there is no part of the world to which they might not be sent for their redress."

UNITED STATES. v. DIEKLEMAN.

(92 U. S. 520.)

APART FROM TREATY, MERCHANT VESSELS NOT EXEMPT  
FROM LOCAL JURISDICTION.

Mr. Chief Justice Waite delivered the opinion of the court.

This suit was brought in the Court of Claims under the authority of a joint resolution of both Houses of Congress, passed May 4, 1870, as follows: —

"That the claim of E. Diekleman, a subject of the King of Prussia, for damages for an alleged detention of the ship 'Essex' by the military authorities of the United States at New Orleans, in the month of September, 1862, be and is hereby referred to the Court of Claims for its decision in accordance with law, and to award such damages as may be just in the premises, if he may be found to be entitled to any damages."

Before this resolution was passed, the matter of the claim had been the subject of diplomatic correspondence between the governments of the United States and Prussia.

The following article, originally adopted in the treaty of peace between the United States and Prussia, concluded

July 11, 1799 (8 Stat. 168), and revived by the treaty concluded May 1, 1828 (8 Stat. 384), was in force when the acts complained of occurred, to wit:—

“ Art. XIII. And in the same case, if one of the contracting parties, being engaged in war with any other power, to prevent all the difficulties and misunderstandings that usually arise respecting merchandise of contraband, such as arms, ammunition, and military stores of every kind, no such articles carried in the vessels, or by the subjects or citizens of either party, to the enemies of the other, shall be deemed contraband so as to induce confiscation or condemnation, and a loss of property, to individuals. Nevertheless, it shall be lawful to stop such vessels and articles, and to detain them for such length of time as the captors may think necessary to prevent the inconvenience or damage that might ensue from their proceeding; paying, however, a reasonable compensation for the loss such arrest shall occasion to the proprietors; and it shall further be allowed to use in the service of the captors the whole or any part of the military stores so detained, paying the owners the full value of the same, to be ascertained by the current price at the place of its destination. But in the case supposed of a vessel stopped for articles of contraband, if the master of the vessel stopped will deliver out the goods supposed to be of contraband nature, he shall be admitted to do it, and the vessel shall not, in that case, be carried into any port, nor further detained, but shall be allowed to proceed on her voyage.”

When the “ Essex ” visited New Orleans, the United States were engaged in the war of the rebellion. The port of that city was, at the very commencement of the war, placed under blockade, and closed against trade and commercial intercourse; but on the 11th of May, 1862, the President, having become satisfied that the blockade might “ be safely relaxed with advantage to the interests of com-

merce," issued his proclamation, to the effect that from and after June 1, "commercial intercourse, \* \* \* except as to persons, things, and information contraband of war," might "be carried on subject to the laws of the United States, and to the limitations, and in pursuance of the regulations \* \* \* prescribed by the Secretary of the Treasury," and appended to the proclamation. These regulations so far as they are applicable to the present case, are as follows:—

"1. To vessels clearing from foreign ports and destined to \* \* \* New Orleans, \* \* \* license will be granted by consuls of the United States upon satisfactory evidence that the vessels so licensed will convey no persons, property, or information contraband of war either to or from the said ports; which licenses shall be exhibited to the collector of the port to which said vessels may be respectively bound, immediately on arrival, and, if required, to any officer in charge of the blockade; and on leaving either of said ports every vessel will be required to have a clearance from the collector of the customs according to law, showing no violation of the conditions of the license." 12 Stat. 1264.

The "Essex" sailed from Liverpool for New Orleans, June 19, 1862, and arrived August 24. New Orleans was then in possession of the military forces of the United States, with General Butler in command. The city was practically in a state of siege by land, but open by sea, and was under martial law.

The commanding general was expressly enjoined by the government of the United States to take measures that no supplies went out of the port which could afford aid to the rebellion; and, pursuant to this injunction, he issued orders in respect to the exportation of money, goods, or property, on account of any person known to be friendly to the Confederacy, and directed the custom-house officers

to inform him whenever an attempt was made to send anything out which might be the subject of investigation in that behalf.

In the early part of September, 1862, General Butler, being still in command, was informed that a large quantity of clothing had been bought in Belgium on account of the Confederate government, and was lying at Matamoras awaiting delivery, because that government had failed to get the means they expected from New Orleans to pay for it; and that another shipment, amounting to a half million more, was delayed in Belgium from coming forward, because of the non-payment of the first shipment. He was also informed that it was expected the first payment would go forward through the agency of some foreign consuls; and this afterwards proved to be correct.

He was also informed early in September by the custom-house officers, that large quantities of silver-plate and bullion were being shipped on the "Essex," then loading for a foreign port, by persons, one of whom had declared himself an enemy of the United States, and none of whom would enroll themselves as friends; and he thereupon gave directions that the specified articles should be detained, and their exportation not allowed until further orders.

On the 15th September, the loading of the vessel having been completed, the master applied to the collector of the port for his clearance, which was refused in consequence of the orders of General Butler, but without any reasons being assigned to the collectors. The next day, he was informed, however, that his ship would not be cleared until certain specified articles which she had on board were taken out and landed. Much correspondence ensued between General Butler and the Prussian consul at New Orleans in reference to the clearance, in which it was distinctly stated by General Butler that the clearance would not be granted until the specified goods were landed, and

that it would be granted as soon as this should be done. Almost daily interviews took place between the master of the vessel and the collector, in which the same statements were made by the collector. The master refused to land the cargo, except upon the return of his bills of lading. Some of these bills were returned, and the property surrendered to the shipper. In another case, the shipper gave an order upon the master for his goods, and they were taken away by force. At a very early stage in the proceeding, the master and the Prussian consul were informed that the objection to the shipment of the articles complained of was that they were contraband.

A part only of the goods having been taken out of the vessel a clearance was granted her on the 7th of October, and she was permitted to leave the port and commence her voyage.

Upon this state of facts, the Court of Claims gave judgment for Diekleman, from which the United States took an appeal.

One nation treats with the citizens of another only through their government. A sovereign cannot be sued in his own courts without his consent. His own dignity, as well as the dignity of the nation he represents, prevents his appearance to answer a suit against him in the courts of another sovereignty, except in performance of his obligations, by treaty or otherwise, voluntarily assumed. Hence a citizen of one nation wronged by the conduct of another nation, must seek redress through his own government. His sovereign must assume the responsibility of presenting his claim, or it need not be considered. If this responsibility is assumed, the claim may be prosecuted as one nation proceeds against another, not by suit in the courts, as of right, but by diplomacy, or, if need be, by war. It rests with the sovereign against whom the demand is made to determine for himself what he will do in respect



to it. He may pay or reject it; he may submit to the arbitration, open his own courts to suit, or consent to be tried in the courts of another nation. All depends upon himself.

In this case, Diekleman, claiming to have been injured by the alleged wrongful conduct of the military forces of the United States, made his claim known to his government. It was taken into consideration, and became the subject of diplomatic correspondence between the two nations. Subsequently, Congress, by joint resolution, referred the matter to the Court of Claims "for its decision according to law." The courts of the United States were thus opened to Diekleman for this proceeding. In this way the United States have submitted to the Court of Claims, and through that court upon appeal to us, the determination of the question of their legal liability under all circumstances of this case for the payment of damages to a citizen of Prussia upon a claim originally presented by his sovereign in his behalf. This requires us, as we think, to consider the rights of the claimant under the treaty between the two governments, as well as under the general law of nations. For all the purposes of its decision, the case is to be treated as one in which the government of Prussia is seeking to enforce the rights of one of its citizens against the United States in a suit at law which the two governments have agreed might be instituted for that purpose. We shall proceed upon that hypothesis.

#### I. As to the general law of nations.

The merchant vessels of one country visiting the ports of another for the purposes of trade subject themselves to the laws which govern the port they visit, so long as they remain; and this as well in war as in peace, unless it is otherwise provided by treaty. *The Exchange v. McFadon*, 7 Cranch, 316. When the "Essex" sailed from Liverpool, the United States were engaged in war. The proclamation

under which she was permitted to visit New Orleans made it a condition of her entry that she should not take out any goods contraband of war, and that she should not leave until cleared by the collector of customs according to law. Previous to June 1, she was excluded altogether from the port by the blockade. At that date the blockade was not removed, but relaxed only in the interests of commerce. The war still remained paramount, and commercial intercourse subordinate only. When the "Essex" availed herself of the proclamation and entered the port, she assented to the conditions imposed, and cannot complain if she was detained on account of the necessity of enforcing her obligations thus assumed.

The law by which the city and port were governed was martial law. This ought to have been expected by Dieckleman when he dispatched his vessel from Liverpool. The place had been wrested from the possession of the enemy only a few days before the issue of the proclamation, after a long and desperate struggle. It was, in fact, a garrisoned city, held as an outpost of the Union army, and closely besieged by land. So long as it remained in the possession of the insurgents, it was to them an important blockade-running point, and after its capture the inhabitants were largely in sympathy with the rebellion. The situation was, therefore, one requiring the most active vigilance on the part of the general in command. He was especially required to see that the relaxation of the blockade was not taken advantage of by the hostile inhabitants to promote the interests of the enemy. All this was matter of public notoriety; and Dieckleman ought to have known, if he did not in fact know, that although the United States had to some extent opened the port in the interests of commerce, they kept it closed to the extent that it was necessary for the vigorous prosecution of the war. When he entered the port, therefore, with his vessel, under the special

license of the proclamation, he became entitled to all the rights and privileges that would have been accorded to a loyal citizen of the United States under the same circumstances, but no more. Such restrictions as were placed upon citizens, operated equally with him. Citizens were governed by martial law. It was his duty to submit to the same authority.

Martial law is the law of military necessity in the actual presence of war. It is administered by the general of the army and is in fact his will. Of necessity it is arbitrary; but it must be obeyed. New Orleans was at this time the theater of the most active and important military operations. The civil authority was overthrown. General Butler, in command, was the military ruler. His will was law, and necessarily so. His first great duty was to maintain on land the blockade which had theretofore been kept up by sea. The partial opening of the port toward the sea, made it all the more important that he should bind close the military lines on the shore which he held.

To this law and this government the "Essex" subjected herself when she came into port. She went there for gain, and voluntarily assumed all the chances of war into whose presence she came. By availing herself of the privileges granted by the proclamation, she, in effect, covenanted not to take out of the port, "persons, things, or information contraband of war." What is contraband depends upon circumstances. Money and bullion do not necessarily partake of that character; but, when destined for hostile use or to procure hostile supplies, they do. Whether they are so or not, under the circumstances of a particular case, must be determined by some one when a necessity for action occurs. At new Orleans, when this transaction took place, this duty fell upon the general in command. Military commanders must act to a great extent upon appearances. As a rule, they have but little time to take and

consider testimony before deciding. Vigilance is the law of their duty. The success of their operations depends to a great extent upon their watchfulness.

General Butler found on board this vessel articles which he had reasonable cause to believe, and did believe, were contraband, because intended for use to promote the rebellion. It was his duty, therefore, under his express instructions, to see that the vessel was not cleared with these articles on board; and he gave orders accordingly. It matters not now whether the property suspected was in fact contraband or not. It is sufficient for us that he had reason to believe, and in fact did believe, it to be contraband. No attempt has been made to show that he was not acting in good faith. On the contrary, it is apparent, from the finding of the court below, that the existing facts brought to his knowledge were such as to require his prompt and vigorous action in the presence of the imminent danger with which he was surrounded. Certainly enough is shown to make it necessary for this plaintiff to prove the innocent character of the property before he can call upon the United States to respond to him in damages for the conduct of their military commander, upon whose vigilance they relied for safety.

Believing, then, as General Butler did, that the property was contraband, it was his duty to order it out of the ship, and to withhold her clearance until his order was complied with. He was under no obligation to return the bills of lading. The vessel was bound not to take out any contraband cargo. She took all the risks of this obligation when she assumed it, and should have protected herself in her contracts with shippers against the contingency of being required to unload after the goods were on board. If she failed in this, the consequences are upon her, and not the United States. She was operating in the face of war, the chances of which might involve her and her cargo

in new complications. She voluntarily assumed the risks of her hazardous enterprise, and must sustain the losses that follow.

Neither does it affect the case adversely to the United States that the property had gone on board without objection from the custom-house officers or the military authorities. It is not shown that its character was known to General Butler or the officers of the custom-house before it was loaded. The engagement of the vessel was not to leave until she had been cleared according to law, and that her clearance might be withheld until with reasonable diligence it could be ascertained that she had no contraband property on board. This is the legitimate effect of the provisions of the treasury regulations, entitling her to license "upon satisfactory evidence" that she would "convey no persons, property, or information contraband of war, either to or from" the port; and requiring her not to leave until she had a "clearance from the collector of the customs, according to law, showing no violation of the license." Her entry into the port was granted as a favor, not as a right, except upon the condition of assent to the terms imposed. If the collector of customs was to certify that the license she held had not been violated, it was his duty to inquire as to the facts before he made the certificate. Every opportunity for the prosecution of this inquiry must be given. Under the circumstances, the closest scrutiny was necessary. If, upon the examination preliminary to the clearance, prohibited articles were found on board, there could be no certificate such as was required, until their removal. It would then be for the vessel to determine whether she would remove the goods and take the clearance, or hold the goods and wait for some relaxation of the rules which detained her in port as long as she had them on board. General Butler only insisted upon her remaining until she removed the property. She elected to

remain. There was no time when her clearance would not have been granted if the suspected articles were unloaded.

We are clearly of the opinion that there is no liability to this plaintiff resting upon the United States under the general law of nations.

2. As to the treaty.

The vessel was in port when the detention occurred. She had not broken ground, and had not commenced her voyage. She came into the waters of the United States while an impending war was flagrant, under an agreement not to depart with contraband goods on board. The question is not whether she could have been stopped and detained after her voyage had been actually commenced, without compensation for the loss, but whether she could be kept from entering upon the voyage and detained by the United States within their own waters, held by force against a powerful rebellion, until she had complied with regulations adopted as a means of safety, and to the enforcement of which she had assented, in order to get there. In our opinion, no provision of the treaties in force between the two governments interferes with the right of the United States, under the general law of nations, to withhold a custom-house clearance as a means of enforcing port regulations.

Art. XIII. of the treaty of 1828 contemplates the establishment of blockades and makes special provisions for the government of the respective parties in case they exist. The vessels of one nation are bound to respect the blockades of the other. Clearly the United States had the right to exclude Prussian vessels, in common with those of all other nations, from their ports altogether, by establishing and maintaining a blockade while subduing a domestic insurrection. The right to exclude altogether necessarily carries with it the right of admitting through an existing

blockade upon conditions, and of enforcing in an appropriate manner the performance of the conditions after admission has been obtained. It will not be contended that a condition which prohibits the taking out of contraband goods is unreasonable or that its performance may not be enforced by refusing a clearance until it has been complied with. Neither, in the absence of treaty stipulations to the contrary, can it be considered unreasonable to require goods to be unloaded, if their contraband character is discovered after they have gone on board. In the existing treaties between the two governments there is no such stipulation to the contrary. In the treaty of 1799 Art. VI. is as follows: "That the vessels of either party, loading within the ports or jurisdiction of the other, may not be uselessly harassed or detained, it is agreed that all examinations of goods required by the laws shall be made before they are laden on board the vessel, and that there shall be no examination after." While other articles in the treaty of 1799 were revived and kept in force by that of 1828, this was not. The conclusion is irresistible, that the high contracting parties were unwilling to continue bound by such a stipulation, and, therefore, omitted it from their new arrangement. It would seem to follow that, under the existing treaty, the power of search and detention for improper practices continued, in time of peace even, until the clearance had been actually perfected and the vessel had entered on her voyage. If this be the rule in peace, how much more important is it in war for the prevention of the use of friendly vessels to aid the enemy.

Art. XIII of the treaty of 1799, revived by that of 1828, evidently has reference to captures and detentions in port, to enforce port regulations. The vessel must be "stopped in her voyage," not detained in port alone. There must be "captors;" and the vessels must be in a condition to be "carried into port" before this article can become

operative. Under its provisions the vessel "stopped" might "deliver out the goods supposed to be contraband of war," and avoid further "detention." In this case there was no detention upon a voyage, but a refusal to grant a clearance from a port that the voyage might be commenced. The vessel was required to "deliver out the goods supposed to be contraband," before she could move out of the port. Her detention was not under the authority of the treaty, but in consequence of her resistance of the orders of the properly constituted port authorities, whom she was bound to obey. She preferred detention in port to a clearance on the conditions imposed. Clearly her case is not within the treaty. The United States, in detaining, used the right they had under the law of nations and their contract with the vessel, not one which, to use the language of the majority of the Court of Claims, they held under the treaty "by purchase" at a stipulated price.

As we view the case, the claimant is not "entitled to any damages" as against the United States, either under the treaty with Prussia or by the general law of nations.

The judgment of the Court of Claims is, therefore, reversed, and the cause remanded with directions to dismiss the petition.

**THE DIRECT UNITED STATES CABLE COMPANY v. THE ANGLO-AMERICAN CABLE COMPANY.**

Privy Council, 1877.

(Snow's Cases, p. 45.)

**JURISDICTION OVER BAYS.**

This suit was one in which the respondent company had obtained an injunction against the appellant company restraining them from laying a telegraph cable in Conception Bay, Newfoundland, and thereby infringing rights granted by the legislature of that island to the respondent



company. The appellant company contended that Conception Bay (which is rather more than twenty miles wide at its mouth and runs inland between forty and fifty miles) was not British territorial waters, but a part of the high seas. The buoy and cables complained of were laid within the bay at a distance of more than three miles from the shore.

The judgment was delivered by Lord Blackburn, who after reviewing the cases under the common law of England continued: "passing from the common law of England, to the general law of nations, as indicated by the text-writers on international jurisprudence, we find an universal agreement that harbors, estuaries, and bays landlocked, belonging to the territory of the nation which possesses the shores round them, but no agreement as to what is the rule to determine what is 'a bay' for this purpose.

"It seems generally agreed that where the configuration and dimensions of the bay are such as to show that the nation occupying the adjoining coasts also occupies the bay, it is part of the territory, and with this idea, most of the writers on the subject refer to defensibility from the shore as of occupation; some suggesting, therefore, a width of one cannon-shot from shore to shore, or three miles; some a cannon-shot from each shore, or six miles; some an arbitrary distance of ten miles. All of these are rules which, if adopted, would exclude Conception Bay from the territory of Newfoundland, but also would have excluded from the territory of Great Britain, that part of the British Channel which in *Reg. v. Cunningham* was decided to be in the county of Glamorgan. On the other hand, the diplomatists of the United States in 1793 claimed a territorial jurisdiction over much more extensive bays, and Chancellor Kent, in his *Commentaries*, though by no means giving the weight of his authority to

this claim, gives some reasons for not considering it altogether unreasonable. It does not appear to their Lordships that jurists and text-writers are agreed what are the rules as to dimensions and configurations, which, apart from other considerations, would lead to the conclusion that a bay is not a part of the territory of the state possessing the adjoining coasts; and it has never, that they can find, been made the ground of any judicial determination. If it was necessary in this case to lay down a rule the difficulty of the task would not deter their Lordships from attempting to fulfill it. But in their opinion it is not necessary so to do. It seems to them that, in point of fact, the British Government has for a long period exercised dominion over this bay, and that their claim has been acquiesced in by other nations, so as to show that the bay has been for a long time occupied exclusively by Great Britain, a circumstance which in the tribunals of any country would be very important. And moreover (which in a British tribunal is conclusive), the British legislature has by acts of Parliament declared it to be part of the British territory, and part of the country made subject of the legislature of Newfoundland.

“ Their Lordships, therefore, will humbly recommend to Her Majesty that the order of the Supreme Court of Newfoundland be affirmed and that this appeal be dismissed with costs.”

#### THE CAROLINE.

(Wharton's Digest, Sec. 50c; Snow's Cases, 177.)

#### JURISDICTION AS EXTENDED UPON THE GROUND OF SELF-DEFENSE.

In 1837 an insurrectionary movement was made in Upper Canada, having in view a reform in the government of that province. A proclamation had been issued from Navy

Island, in the Niagara River, signed by William Lyon Mackenzie, chairman pro tem. of the provincial government, calling upon the reformers to make that island their place of rendezvous, and to aid otherwise in revolutionizing the province. It stated that the command of the forces was given to General Van Rensselaer, a son of General Solomon Van Rensselaer, of Albany. The sympathy manifested by some citizens of the United States with the Canadian insurgents, induced the governors of New York and Vermont to issue proclamations, warning the citizens of these States to refrain from any unlawful acts within the territory of the United States. Notwithstanding these proclamations, the insurgents were joined by citizens of the United States; whence also they received arms and munitions of war. The steamboat *Caroline*, owned by an American citizen, was said to be engaged in transporting recruits and supplies to the rendezvous on Navy Island; and it was further presumed that this boat would be the means of transferring the expedition to the Canadian shore. Under these circumstances the British officer in command determined to destroy the *Caroline*. A force was accordingly dispatched for that purpose on the night of the 29th of December, 1837. Not finding her at Navy Island, the party proceeded to her moorings at Schlosser on the American shore, attacked the crew, one of whom was killed, took the boat into the stream and left it to be carried over Niagara Falls. A proclamation was promptly issued (January 5, 1838) by President Van Buren, enjoining on all citizens obedience to the laws and warning them that the violation of our neutrality would submit the offenders to punishment. General Scott was forthwith ordered to the Canadian frontier to assume the military command there; and requisitions were made upon the Governors of New York

and Vermont for such militia force as General Scott might require for the defense of the frontier.

On the other hand, the act was made a subject of complaint by the American government, on the ground of a violation of territory; but it was justified by Great Britain on the ground of the necessity of self-preservation.

The question remained unsettled until 1842, when Mr. Webster, in correspondence with Lord Ashburton, contended, that for such an infringement of territorial rights, the British government must show "a necessity of self-defense, instant, overwhelming, and leaving no choice of means and no moment for deliberation:" and it should further appear that the Canadian authorities in acting under this exigence, "did nothing unreasonable or excessive, since the act justified by the necessity of self-defense, must be limited by that necessity and clearly kept within it." Lord Ashburton admitted the correctness of Mr. Webster's doctrine, and asserted that the destruction of the *Caroline* came fully within its limits; and, though the act was justifiable, an apology for the violation of territory should have been made at the time. This was accepted by the United States as satisfactory, and the subject was allowed to drop. (Parliamentary Papers, 1843, lxi. 46-51; Wharton's Digest of International Law, I., Sec. 50c; Benton's Thirty Years in the Senate, II., 289, 455.)

#### HUDSON v. GUESTIER.

(6 Cranch, 281.)

#### JURISDICTION BEYOND TERRITORIAL WATERS.

Error to the circuit court for the district of Maryland, in an action of trover for coffee and logwood, the cargo of the brig *Sea Flower*, which had been captured by the French, for trading to the revolted ports of the island of Hispaniola, contrary to the ordinances of France, and

carried into the Spanish port of Baracoa, but condemned by a French tribunal at Guadaloupe, and sold for the benefit of the captors, and purchased by the defendant Guestier.

Upon the former trial of this case in the court below, a statement of certain facts was agreed to by the counsel for the parties, and read in evidence to the jury, who then found a verdict for the plaintiffs. One of the facts so admitted, and which was then deemed wholly immaterial by both parties, was, that The Sea Flower was captured within one league of the coast of the island of Hispaniola. Upon this fact, which was the only fact in which this case differed from that of *Rose v. Himely* (4 C. 241, *ante*, 87), the supreme court reversed the first judgment of the court below (4 C. 293, *ante*, 107), which had been for the plaintiffs, and remanded the cause for further proceedings.

Upon the second trial in the court below, the verdict and judgment were for the defendant.

The plaintiffs took a bill of exception to the opinion of the court, who directed the jury "that if they find from the evidence produced, that the brig Sea Flower had traded with the insurgents at Port au Prince, in the island of St. Domingo, and had there purchased a cargo of coffee and logwood, and, having cleared at the said port, and coming from the same, was captured by a French privateer, duly commissioned as such, within six leagues of the island of St. Heneague, a dependency of St. Domingo, for a breach of said municipal regulations, that in such case the capture of The Sea Flower was legal, although such capture was made at the distance of six leagues from the said island of St. Domingo, or St. Heneague, its dependency, and beyond the territorial limits or jurisdiction of said island, and, that the said capture, possession, subsequent condemnation and sale of the said Sea Flower, with

her cargo, divested the said cargo out of the plaintiffs, and the property therein became vested in the purchaser."

Livingston, J. In this case, when here before, I dissented from the opinion of the court, because I did not think that the condemnation of a French court at Guadeloupe, of a vessel and cargo lying in the port of another nation, had changed the property; but this ground, which was the only one taken by two of the judges in this case, and by three, in that of *Himely v. Rose*, and was principally and almost solely relied on at bar, was overruled by a majority of the court, as will appear by examining those two cases, which were decided the same day. I am not, therefore, in determining this cause, as it now comes up, at liberty to proceed upon it; and such must have been the opinion of Judge Chase, on the trial of it, who was one of the court who had proceeded on that principle.

Considering it, then, as settled that the French tribunal has jurisdiction of property seized under a municipal regulation, within the territorial jurisdiction of the government of St. Domingo, it only remains for me to say whether it will make any difference if, as now appears to have been the case, the vessel were taken on the high seas, or more than two leagues from the coast. If the *res* can be proceeded against when not in the possession or under the control of the court, I am not able to perceive how it can be material whether the capture were made within or beyond the jurisdictional limits of France; or in the exercise of a belligerent or municipal right. By a seizure on the high seas, she interfered with the jurisdiction of no other nation, the authority of each being there concurrent. It would seem also that, if jurisdiction be at all permitted where the thing is elsewhere, the court exercising it must necessarily decide, and that ultimately, or subject only to the review of a superior tribunal of its own State, whether, in the particular case, she has jurisdiction, if any objec-

tion be made to it. And, although it be now stated, as a reason why we should examine whether a jurisdiction was rightfully exercised over *The Sea Flower*, that she was captured more than two leagues at sea, who can say that this very allegation, if it had been essential, may not have been urged before the French court, and the fact decided in the negative. And, if so, why should not its decision be as conclusive on this as on any other point? The judge must have had a right to dispose of every question which was made on behalf of the owner of the property, whether it related to his own jurisdiction, or arose out of the law of nations, or out of the French decrees, or in any way: and, even if the reasons of his judgment should not appear satisfactory, it would be no reason for a foreign court to review his proceedings, or not to consider his sentence as conclusive on the property.

Believing, therefore, that this property was changed by its condemnation at Guadeloupe, the original owner can have no right to pursue it in the hands of any vendee under that sentence, and the judgment below must, therefore, be affirmed.

The other judges, except the chief justice, concurred.

#### WILDENHUS'S CASE.

(120 U. S. 1.)

#### JURISDICTION OVER MERCHANT VESSELS.

This appeal brought up an application made to the Circuit Court of the United States for the District of New Jersey, by Charles Mali, the "Consul of His Majesty the King of the Belgians, for the State of New York and New Jersey, in the United States," for himself as such consul, "and in behalf of one Joseph Wildenhuss, one Gionviennie Gobnbosich, and one John J. Ostenmeyer," for a release, upon a writ of habeas corpus, of Wildenhuss, Gobnbosich,

and Ostenmeyer from the custody of the keeper of the common jail of Hudson County, New Jersey, and their delivery to the consul, "to be dealt with according to the law of Belgium." The facts on which the application rested were thus stated in the petition for the writ: —

"Second. That on or about the sixth day of October, 1886, on board the Belgian steamship Noordland, there occurred an affray between the said Joseph Wildenhuis and one Fijens, wherein and whereby it is charged that the said Wildenhuis stabbed with a knife and inflicted upon the said Fijens a mortal wound, of which he afterward died.

"Third. That the said Wildenhuis is a subject of the Kingdom of Belgium and has his domicile therein, and is one of the crew of the said steamship Noordland, and was such when the said affray occurred.

"Fourth. That the said Fijens was also a subject of Belgium and had his domicile and residence therein, and at the time of the said affray, as well as at the time of his subsequent death, was one of the crew of the said steamship.

"Fifth. That at the time said affray occurred the said steamship Noordland was lying moored at the dock of the port of Jersey City, in said State of New Jersey.

"Sixth. That the said affray occurred and ended wholly below the deck of the said steamship, and that the tranquillity of the said port of Jersey City was in no wise disturbed or endangered thereby.

"Seventh. That said affray occurred in the presence of several witnesses all of whom were and still are of the crew of the said vessel, and that no other person or persons except those of the crew of said vessel were present or near by.

"Eighth. Your petitioner therefore respectfully shows unto this honorable court that the said affray occurred outside of the jurisdiction of the said State of New Jersey.

"Ninth. But, notwithstanding the foregoing facts, your petitioner respectfully further shows that the police author-



ities of Jersey City, in said State of New Jersey, have arrested the said Joseph Wildenhus, and also the said Gionviennie Gobnbosich and John J. Ostenmeyer, of the crew of the said vessel (one of whom is a quartermaster thereof), and that said Joseph Wildenhus has been committed by a police magistrate, acting under the authority of the said State, to the common jail of the county of Hudson, on a charge of an indictable offense under the laws of the said State of New Jersey, and is now held in confinement by the keeper of the said jail, and that others of the said crew arrested as aforesaid are also detained in custody and confinement as witnesses to testify for such proceedings as may hereafter be had against the said Wildenhus."

Articles 8, 9 and 10 of a royal decree of the King of the Belgians, made on the 11th of March, 1857, relating to consuls and consular jurisdiction, were as follows:—

"Art. 8. Our consuls have the right of discipline on Belgian merchant vessels in all the ports and harbors of their district.

"In matters of offenses or crimes they are to make the examination conformably to the instructions of the disciplinary and penal code of the merchant service.

"They are to claim, according to the terms of the conventions and laws in force, the assistance of the local authorities for the arrest and taking on board of deserting seamen.

"Art. 9. Except in the case where the peace of the port shall have been compromised by the occurrence, the consul shall protest against every attempt that the local authority may make to take cognizance of crimes or offenses committed on board of a Belgian vessel by one of the ship's company towards one, either of the same company, or of the company of another Belgian vessel.

"He shall take the proper steps to have the cognizance

of the case turned over to him, in order that it be ultimately tried according to Belgian laws.

“ Art. 10. When men belonging to the company of a Belgian vessel shall be guilty of offenses or crimes out of the ship, or even on board the ship, but against persons not of the company, the consul shall, if the local authority arrests or prosecutes them, take the necessary steps to have the Belgians so arrested treated with humanity, defended and treated impartially.”

The application in this case was made under the authority of these Articles.

Article XI of a Convention between the United States and Belgium “ concerning the rights, privileges, and immunities of consular officers,” concluded March 9, 1880, and proclaimed by the President of the United States, March 1, 1881, 21 Stat. 776, 781, is as follows:—

“ The respective consuls-general, consuls, vice-consuls, and consular agents shall have exclusive charge of the internal order of the merchant vessels of their nation, and shall alone take cognizance of all differences which may arise, either at sea or in port, between the captains, officers, and crews, without exception, particularly with reference to the adjustment of wages and the execution of contracts. The local authorities shall not interfere, except when the disorder that has arisen is of such a nature as to disturb tranquillity and public order on shore, or in the port, or when a person of the country or not belonging to the crew, shall be concerned therein.

“ In all other cases, the aforesaid authorities shall confine themselves to lending aid to the consuls and vice-consuls or consular agents, if they are requested by them to do so, in causing arrest and imprisonment of any person whose name is inscribed on the crew list, whenever, for any cause, the said officers shall think proper.”

The claim of the consul was, that, by the law of nations,

and the provisions of this treaty, the offense with which Wildenhus was charged is "solely cognizable by the authority of the laws of the Kingdom of Belgium, and that the State of New Jersey was without jurisdiction in the premises. The Circuit Court refused to deliver the prisoners to the consul and remanded them to the custody of the jailor. 28 Fed. Rep. 934. To reverse that decision this appeal was taken.

Mr. Chief Justice Waite, after stating the case as above reported, delivered the opinion of the court.

By sections 751 and 753 of the Revised Statutes, the courts of the United States have power to issue writs of habeas corpus which shall extend to prisoners in jail when they are in "custody in violation of the Constitution or a law or treaty of the United States, and the question we have to consider is, whether these prisoners are held in violation of the provisions of the existing treaty between the United States and Belgium.

It is part of the law of civilized nations that when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement; for, as was said by Chief Justice Marshall in *The Exchange*, 7 Cranch, 116, 144, "it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction and the government to degradation, if such \* \* \* merchants did not owe temporary and local allegiance and were not amenable to the jurisdiction of the country. *United States v. Diekelman*, 92 U. S. 520; 1 Phillimore's *Int. Law*, 3d ed. 483, section 351; Twiss' *Law of Nations in Time of Peace*, 229, section 159; Creasy's *Int. Law*, 167, section 176; Halleck's *Int. Law*, 1st ed. 171. And the English judges have uni-

formly recognized the rights of the courts of the country of which the port is part to punish crimes committed by one foreigner on another in a foreign merchant ship. *Regina v. Cunningham*, Bell C. C. 72; *s. c.* 8 Cox C. C. 104; *Regina v. Anderson*, 11 Cox C. C. 198, 204; *s. c.* L. R. 1 C. C. 161, 165; *Regina v. Keyn*, 13 Cox C. C. 403, 485, 525; *s. c.* 2 Ex. Div. 63, 161, 213. As the owner has voluntarily taken his vessel for his own private purposes to a place within the dominion of the government other than his own, and from which he seeks protection during his stay, he owes that government such allegiance for the time being as is due for the protection to which he becomes entitled.

From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew towards the vessel or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require. But if crimes are committed on board of a character to disturb the peace and tranquillity of the country to which the vessel has been brought, the offenders have never by comity or usage been entitled to any exemption from the operation of the local laws for their punishment, if the local tribunals see fit to assert their authority. Such being the general public law on this subject, treaties and conventions have been entered into between nations having commercial intercourse, the pur-

pose of which was to settle and define the rights and duties of the contracting parties with respect to each other in these particulars, and thus prevent the inconvenience that might arise from attempts to exercise conflicting jurisdictions.

The first of these conventions entered into by the United States after the adoption of the Constitution was with France, on the 14th of November, 1788, 8 Stat. 106, "for the purpose of defining and establishing the functions and privileges of their respective consuls and vice-consuls," Art. VIII of which is as follows: —

"The consuls or vice-consuls shall exercise police over all the vessels of their respective nations, and shall have on board the said vessels all power and jurisdiction in civil matters, in all the disputes which may there arise; they shall have an entire inspection over the said vessels, their crew, and the changes and substitutions there to be made; for which purpose they may go on board the said vessels whenever they may judge it necessary. Well understood that the functions hereby allowed shall be confined to the interior of the vessels, and that they shall not take place in any case which shall have any interference with the police of the ports where the said vessels shall be."

It was when this convention was in force that the cases of *The Sally* and *The Newton* arose, an account of which is given in Wheaton's *Elements of International Law* (3d ed.) 153, and in 1 Phillimore's *International Law* (3d ed.) 484 and (2d ed.) 407. *The Sally* was an American merchant vessel in the port of Marseilles, and the *Newton* a vessel of a similar character in the port of Antwerp, then under the dominion of France. In the case of *The Sally*, the mate, in the alleged exercise of discipline over the crew, had inflicted a severe wound on one of the seamen, and in that of *The Newton* one seaman had made an assault on another seaman in the vessel's boat. In each case the

proper consul of the United States claimed exclusive jurisdiction of the offense, and so did the local authorities of the port; but the Council of State, a branch of the political department of the government of France to which the matter was referred, pronounced against the local tribunals, "considering that one of these cases was that of an assault committed in the boat of the American ship *Newton*, by one of the crew upon another, and the other was that of a severe wound inflicted by the mate of the American ship *Sally* upon one of the seamen for having made use of the boat without leave." This was clearly because the things done were not such as to disturb "the peace or tranquillity of the port." Wheaton's *Elements Int. Law*, 3d ed. 154. The case of *The Sally* was simply a quarrel between certain of the crew while constructively on board the vessel, and that of the *Newton* grew out of a punishment inflicted by an officer on one of the crew for disobedience of orders. Both were evidently of a character to affect only the police of the vessel, and thus within the authority expressly granted to the consul by the treaty.

No other treaty or convention bearing on this subject, to which our attention has been called, was entered into by the United States until a treaty with Sweden and Norway, on the 4th of September, 1816, 8 Stat. 232, where it was agreed, by Art. 5, that: "The consuls and their deputies shall have the right, as such, to act as judges and arbitrators in the differences which may arise between the captain and crews of the vessels of the nation whose affairs are intrusted to their care. The respective governments shall have no right to interfere in matters of this kind, except the conduct of the captain or crew shall disturb the peace and tranquillity of the country in which the vessel may be, or the consul of the place shall feel himself obliged to resort to the interposition and support of the executive authority to cause his decision to be respected and maintained.

It being, nevertheless, understood that this kind of judgment or award shall not deprive the contending parties of the right which they have, on their return, to recur to the judicial authorities of their own country."

Substantially the same provision is found in treaties or conventions concluded with Prussia in 1828, Art. X, 8 Stat. 382; with Russia in 1832, Art. VIII, *id.* 448; with Greece in 1837, Art. XII, *id.* 504; with Hanover in 1840, Art. VI, *id.* 556; with Portugal also in 1840, Art. X, *id.* 564; with the Grand Duchy of Mecklenburg-Schwerin in 1847, Art. IX, 9 Stat. 916; with Oldenburg in 1847, *id.* 868; with Austria in 1848, Art. IV, *id.* 946; with the Hanseatic Republics in 1852, Art. I, 10 Stat. 961; with the Two Sicilies in 1855, Art. XIX, 11 Stat. 650; with Denmark in 1861, Art. I, 13 Stat. 605; and with the Dominican Republic in 1867, Art. XXVI, 15 Stat. 487

In a convention with New Grenada concluded in 1850 the provision was this

"They (the consuls, etc.) may cause proper order to be maintained on board of vessels of their nation, and may decide on the disputes arising between the captains, the officers, and the members of the crew, unless the disorders taking place on board should disturb the public tranquillity, or persons not belonging to the crew or to the nation in whose service the consul is employed; in which case the local authorities may interfere." Art. III, clause 8, 10 Stat. 903.

Following this was a convention with France, concluded in 1853, 10 Stat. 996, Art. VIII of which is as follows :—

"The respective consuls-general, consuls, vice-consuls, or consular agents, shall have exclusive charge of the internal order of the merchant vessels of their nation, and shall alone take cognizance of differences which may arise, either at sea or in port, between the captain, officers, and crew, without exception, particularly in reference to the ad-

justment of wages and the execution of contracts. The local authorities shall not, on any pretext, interfere in these differences, but shall lend forcible aid to the consuls, when they may ask it, to arrest and imprison all persons composing the crew whom they may deem it necessary to confine. Those persons shall be arrested at the sole request of the consuls, addressed in writing to the local authority, and supported by an official extract from the register of the ship or the list of the crew, and shall be held, during the whole time of their stay in the port, at the disposal of the consuls. Their release shall be granted at the mere request of the consuls made in writing. The expenses of the arrest and detention of those persons shall be paid by the consuls."

The same provision in substantially the same language was embraced in a convention with Italy in 1868, Art. XI, 15 Stat. 609; and in another with Belgium, also in 1868, Art. XI, 16 Stat. 761. This convention with Belgium continued in force until superseded by that of 1880-81, under which the present controversy arose.

The form of the provision found in the present convention with Belgium first appeared in a convention with Austria concluded in 1870, Art. XI, 17 Stat. 827, and it is found now in substantially the same language in all the treaties and conventions which have since been entered into by the United States on the same subject. See the conventions with the German Empire in 1871, Art. XIII, 17 Stat. 927; with the Netherlands in 1878, Art. XI, 21 Stat. 668; with Italy in 1881, Art. I, 22 Stat. 832; with Belgium in 1881, as stated above; and with Roumania the same year, Art. XI, 23 Stat. 714.

It thus appears that at first provision was made only for giving consuls police authority over the interior of the ship and jurisdiction in civil matters arising out of disputes or differences on board, that is to say, between



those belonging to the vessel. Under this police authority the duties of the consuls were evidently confined to the maintenance of order and discipline on board. This gave them no power to punish for crimes against the peace of the country. In fact, they were expressly prohibited from interfering with the local police in matters of that kind. The cases of *The Sally* and *The Newton* are illustrative of this position. That of *The Sally* related to the discipline of the ship, and that of *The Newton* to the maintenance of order on board. In neither case was the disturbance of a character to affect the peace or the dignity of the country.

In the next conventions consuls were simply made judges and arbitrators to settle and adjust differences between those on board. This clearly related to such differences between those belonging to the vessel as are capable of adjustment and settlement by judicial decision or by arbitration, for it simply made the consuls judges or arbitrators in such matters. That would of itself exclude all idea of punishment for crimes against the State which affected the peace and tranquillity of the port; but, to prevent all doubt on this subject, it was expressly provided that it should not apply to differences of that character.

Next came a form of convention which in terms gave the consuls authority to cause proper order to be maintained on board and to decide disputes between the officers and crew, but allowed the local authorities to interfere if the disorders taking place on board were of such a nature as to disturb the public tranquillity, and that is substantially all there is in the convention with Belgium which we have now to consider. This treaty is the law which now governs the conduct of the United States and Belgium towards each other in this particular. Each nation has granted to the other such local jurisdiction within its own dominion as may be necessary to maintain order on board

a merchant vessel, but has reserved to itself the right to interfere if the disorder on board is of a nature to disturb the public tranquillity.

The treaty is part of the supreme law of the United States, and has the same force and effect in New Jersey that it is entitled to elsewhere. If it gives the consul of Belgium exclusive jurisdiction over the offense which it is alleged has been committed within the territory of New Jersey, we see no reason why he may not enforce his rights under the treaty by a writ of habeas corpus in any proper court of the United States. This being the case, the only important question left for our determination is whether the thing which has been done—the disorder which has arisen—on board this vessel is of a nature to disturb the public peace, or, as some writers term it, the “public repose” of the people who look to the State of New Jersey for their protection. If the thing done—“the disorder,” as it is called in the treaty—is of a character to affect those on shore or in the port when it becomes known, the fact that only those on the ship saw it when it was done is a matter of no moment. Those who are not on the vessel pay no special attention to the mere disputes or quarrels of the seamen while on board, whether they occur under deck or above. Neither do they, as a rule, care for anything done on board which relates only to the discipline of the ship, or to the preservation of order and authority. Not so, however, with crimes which from their gravity awaken a public interest as soon as they become known, and especially those of a character which every civilized nation considers itself bound to provide a severe punishment for when committed within its own jurisdiction. In such cases inquiry is certain to be instituted at once to ascertain how or why the thing was done, and the popular excitement rises or falls as the news spreads and the facts become

known. It is not alone the publicity of the act, or the noise and clamor which attends it, that fixes the nature of the crime, but the act itself. If that is of a character to awaken public interest when it becomes known, it is a "disorder" the nature of which is to affect the community at large, and consequently to invoke the power of the local government whose people have been disturbed by what was done. The very nature of such an act is to disturb the quiet of a peaceful community, and to create, in the language of the treaty, a "disorder" which will "disturb tranquillity and public order on shore or in the port." The principle which governs the whole matter is this: Disorders which disturb only the peace of the ship or those on board are to be dealt with exclusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed, and, if need be, the offenders punished by the proper authorities of the local jurisdiction. It may not be easy at all times to determine to which of the two jurisdictions a particular act of disorder belongs. Much will undoubtedly depend on the attending circumstances of the particular case, but all must concede that felonious homicide is a subject for the local jurisdiction, and that if the proper authorities are proceeding with the case in a regular way, the consul has no right to interfere to prevent it. That, according to the petition for the habeas corpus, is this case.

This is fully in accord with the practice in France, where the government has been quite as liberal towards foreign nations in this particular as any other, and where, as we have seen in the case of *The Sally* and *The Newton*, by a decree of the Council of State, representing the political department of the government, the French courts were prevented from exercising jurisdiction. But afterwards, in 1859, in the case of *Jally*, the mate of an American merchantman, who had killed one of the crew and severely

wounded another on board the ship in the port of Havre, the Court of Cassation, the highest judicial tribunal of France, upon full consideration held, while the Convention of 1853 was in force, that the French courts had rightful jurisdiction, for reasons which sufficiently appear in the following extract from its judgment:—

“Considering that it is a principle of the law of nations that every state has sovereign jurisdiction throughout its territory;

“Considering that by the terms of Article 3 of the Code Napoleon the laws of police and safety bind all those who inhabit French territory, and that consequently foreigners, even transeuntes, find themselves subject to those laws;

“Considering that merchant vessels entering the port of a nation other than that to which they belong cannot be withdrawn from the territorial jurisdiction, in any case in which the interest of the state of which that port forms part finds itself concerned, without danger to good order and to the dignity of the government;

“Considering that every state is interested in the repression of crimes and offenses that may be committed in the ports of its territory, not only by the men of the ship’s company of a foreign merchant vessel towards men not forming part of that company, but even by men of the ship’s company among themselves, whenever the act is of a nature to compromise the tranquillity of the port, or the local authority is invoked, or the act constitutes crime by common law,” (*droit commun*, the law common to all civilized nations,) “the gravity of which does not permit any nation to leave it unpunished, without impugning its rights of jurisdictional and territorial sovereignty, because that crime is in itself the most manifest as well as the most flagrant violation of the laws which it is the duty of every nation to cause to be respected in all parts of its territory.”

1 Ortolan *Diplomatie de la Mer* (4th ed.), pp. 455, 456; Sirey (N. S.), 1859, p. 189.

## CHAPTER VIII.

### EXTRADITION.

Extradition is the process by which a state in whose territory a crime has been committed and the criminal has escaped from its territory, secures his surrender to it by a formal demand made upon the state into whose territory he has escaped. Whether it rests upon comity or upon treaty only is a matter of dispute. In most countries on the continent of Europe it is allowed to rest upon comity, in the absence of treaty. But in England and the United States it has, almost without exception, been contended that it rests upon treaty only. Some states make a distinction between their obligation to surrender foreigners upon request and that to surrender their own citizens, who may have committed crimes abroad and sought refuge at home.

Basis of extradition.

Which of these views is taken depends largely upon the light in which the particular state views crime and hence the jurisdiction over crime. If the jurisdiction over crime is viewed as a strictly territorial matter, as it is in England and the United States, then no distinction is made between the extradition of their own citizens and of foreigners; for each would have to be punished, if punished at all, in the jurisdiction where the crime was committed. But if, upon the other hand, the criminal jurisdiction of the state is looked upon as following the subject wherever he may go, so that in theory it attaches to him when abroad as well as at home, *i. e.*, is personal rather than territorial, it follows that if a subject commits a crime abroad, immediately upon his return home the power as well as the right of the State to punish him is complete. Where such a view is held, as it is in most of the states of continental Europe and South and Central America, *i. e.*, in

Different views of criminal jurisdiction.

those states which have derived their system of jurisprudence from the Roman Law, the state refuses to surrender its subjects for the purpose of trial and punishment by a foreign state. And why not? If they have the right to try and punish them, they should certainly have as much confidence in their own ability and fairness as in that of a foreign state. With the change from the personal to the territorial conception of sovereignty this view is gradually giving place to the opposite one.

**Vogt's case.**

But to recur to the basis for extradition, the case of Carl Vogt is a most interesting one. Vogt had in 1873 violated the criminal laws of Belgium, and as there was no extradition treaty between the United States and Belgium, his extradition was requested upon the ground of comity. There was no question but that the crimes with which he was charged — murder, burglary, and robbery — were extraditable offenses. The case was carefully considered by our Departments of State and Justice and the decision reached that as an act of comity Vogt's surrender would be illegal for the reason that "the authority of the Executive to abridge personal liberty within the jurisdiction of the United States, and to surrender a fugitive from justice in order that he may be taken away from their jurisdiction, is derived from Congress, which confers that power only where the United States are bound by treaty to surrender such fugitives, and have a reciprocal right to claim similar surrender from another power." (Foreign Relations, 1873, part I, p. 81.) There is room for difference of opinion as to the wisdom of so strict a construction of constitutional powers, the tendency of which would be to make our country the asylum for criminals of those countries with whom we do not chance to have extradition treaties. For such classes, a state can hardly afford to bid.

It does, indeed, in the case of criminals, seem more

advantageous, if not more noble, "to give than to receive." And yet the United States has reversed the principle, for, although refusing to give, we have in certain cases received, in the absence of treaty. The cases I have in mind are those of Tweed and Pratt. The first of these, "Boss" Tweed, had violated the criminal laws of this country and taken refuge in Spain, with which we had no extradition treaty; yet Spain surrendered him and we received him. A similar case is that of Calvin Pratt, who was surrendered to us by Japan, in the absence of treaty.

Cases of Tweed and Pratt.

Where treaties exist they are, as a rule, strictly construed; so that if the crime for which extradition is asked is not the same but merely similar to the one mentioned in the treaty, demand for extradition will not be granted. If the crime is one concerning which there is not general agreement as to what constitutes it, its definition must be contained in the treaty else it is not extraditable under that treaty.

Construction of extradition treaties.

An extradition treaty may require legislation in order to make it operative. Such was the case with our first extradition treaty with England, and as no legislation was enacted by Congress the treaty never became operative. Yet one Thomas Nash, alias Robins, was surrendered by the United States upon request by the British minister claiming the right under the treaty.

When legislation necessary.

Though our first treaty mentioned only the crimes of murder and forgery, it is usual now for treaties of extradition to include the crimes of murder, assaults of an aggravated character, rape, robbery, burglary, arson, larceny, embezzlement, forgery, and counterfeiting.

Extraditable crimes.

Persons will not be surrendered unless there is a prima facie case against them, and in determining this the laws of the state upon whom the demand is made govern. Hence, if the evidence relied upon by the state making the demand is such that it would not be admitted in the courts

Must be prima facie case of guilt.

of the state upon whom the demand is made, or, if admitted, would not convict, then the request for surrender of such person will not be granted.

**How effected.**

Extradition so far as international law is concerned with it is a proceeding between states and the correspondence by which it is effected is naturally through the departments of foreign affairs. Interstate extradition which is common in the United States and many other federal states, is a matter of constitutional law, and with it international law is not concerned.

**To be tried for crime only for which extradited.**

It is an almost invariable rule that where a state consents to the extradition of a person charged with a particular crime or crimes to insist that he be tried for no other than the crime with which he was charged and for the trial of which he was extradited. To attempt such sharp practice is an act of bad faith which may properly be resented and undoubtedly would be if the person being thus dealt with were a citizen of the state which surrendered him.

**Political crimes.**

The United States and several others, particularly republics, have always refused to extradite for political offenses. Sometimes political offenses are expressly excepted in treaties of extradition. But whether they are or not the effect is the same, so far as we are concerned; inasmuch as the United States refuses to extradite for crimes not expressly provided for in our treaties. Though there has never been an authoritative definition of what constitutes a political offense, which is unfortunate in the case of so general a term, yet in the great majority of cases it can be told to a high degree of certainty in a particular case whether or not the offense is a political one.



IN RE CASTIONI.

Queen's Bench, 1890.

(L. R. Queen's Bench Div. 149; Snow's Cases, 163.)

WHAT CONSTITUTES A POLITICAL OFFENSE?

On an application for a writ of habeas corpus, the motion was made on behalf of Angelo Castioni, for an order *nisi* calling upon the solicitor to the Treasury, Franklin Lushington, Esq., a metropolitan police magistrate, and the consul-general of Switzerland as representatives of the Swiss Republic, to show cause why a writ of habeas corpus should not issue to bring up the body of Castioni in order that he might be discharged from custody,

The prisoner, Castioni, had been arrested in England on the requisition of the Swiss Government, and brought before the magistrate at the police court at Bow Street, and by him committed to prison for the purpose of extradition, on a charge of willful murder, alleged to have been committed in Switzerland.

The facts, which were contained in depositions sent from Switzerland, in the depositions taken before the magistrate at Bow Street, and in affidavits used on the motion, were shortly as follows:—

The prisoner was charged with the murder of Luigi Rossi, by shooting him with a revolver on September 11, 1890, in the town of Bellinzona, in the Canton of Ticino, in Switzerland. The deceased, Rossi, was a member of the State Council of the canton of Ticino, and was about twenty-six years of age. The prisoner, Castioni, was a citizen of the same canton: he had resided for seventeen years in England, and arrived at Bellinzona on September 10, 1890. For some time previous to this date much dissatisfaction had been felt and expressed by a large number of the inhabitants of Ticino, at the mode in which the political party

then in power were conducting the government of the canton. A request was presented to the Government for a revision of the Constitution of the canton, under art. 15 of the constitution, which provides that "The constitution of the canton may be revised wholly or partially \* \* \*

(b) at the request of 7,000 citizens presented with the legal formalities. In this case the council shall within one month submit to the people the question whether or not they wish to revise the constitution," and a law of May 9, 1877, prescribes the course to be adopted for the execution of letter (b) of Art. 15.

The Government having declined to take a popular vote on the question of the revision of the constitution, on September 11, 1890, a number of the citizens of Bellinzona, among whom was Castioni, seized the arsenal of the town, from which they took rifles and ammunition, disarmed the gendarmes, arrested and bound or handcuffed several persons connected with the Government, and forced them to march in front of the armed crowd to the municipal palace. Admission to the palace was demanded in the name of the people, and was refused by Rossi and another member of the Government, who were in the palace. The crowd then broke open the outer gate of the palace, and rushed in, pushing before them the Government officials whom they had arrested and bound; Castioni, who was armed with a revolver, was among the first to enter. A second door, which was locked, was broken open, and at this time, or immediately after, Rossi, who was in the passage, was shot through the body with a revolver, and died very soon afterwards. Some other shots were fired, but no one else was injured. Two witnesses, who were present when the shot was fired, and were called before the magistrate at Bow Street, identified Castioni as the person who fired the shot. One of the witnesses called for the prisoner was an advocate named Bruni, who had

taken a leading part in the attack on the municipal palace. In cross-examination he said: "The death of Rossi was a misfortune, and not necessary for the rising." There was no evidence that Castioni had any previous knowledge of Rossi. The crowd then occupied the palace, disarmed the gendarmes who were there, and imprisoned several members of the Government. A provisional Government was appointed, of which Bruni was a member, and assumed the government of the canton, which it retained until dispossessed by the armed intervention of the Federal Government of the Republic.

The magistrate was of opinion that the identification of Castioni was sufficient, and held upon the evidence that the bar to extradition specified in page 3 of the Extradition Act, 1870: "A fugitive criminal shall not be surrendered if the offense in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate, or the court before whom he is brought on *habeas corpus*, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offense of a political character," did not exist, and committed Castioni to prison. By the extradition treaty with Switzerland, dated Nov. 26, 1880, article II: "A fugitive criminal shall not be surrendered if the offense in respect of which his surrender is demanded is one of a political character, or if he prove that the requisition for his surrender has in fact been made with a view to try and punish him for an offense of a political character."

Sir Charles Russell, for the prisoner; the Attorney-General for the Crown.

Denman, J.: "Looking at the extreme importance of this case I should have been disposed, if I had felt any serious doubt as to the course we ought to pursue, to have taken time, not so much to consider what our judgment

should be, as to take care to put it in the best possible shape, or even to reduce it to writing. But there are many considerations which apply to cases of this sort. One is this, that here is a man in custody who had been in custody for a considerable time, and no greater delay than is reasonably necessary ought to be interposed if our decision should be one to the effect that he ought not to be in custody any longer. I am unable to entertain a doubt that this is a case in which we ought to order that the prisoner be discharged.

“ There has been no legal decision as yet upon the meaning of the words contained in the act of 1870, upon the true meaning of which this case mainly depends. We have had many definitions suggested, and great light has been thrown upon the possible and probable meaning of the words by the arguments that have been addressed to us, applying not only the language of judges, but language used in text-books, language used by great political authorities and in one case by a most learned philosopher. I think it has been useful in such a case as this that we should hear a discussion as to the possible meaning of the words, as it has occurred that they ought to be construed to people such as those whose opinions have been cited, and especially I may apply that observation to the case of my very learned brother whose assistance we have on this occasion in deciding the present case. I do not think it is necessary or desirable that we should attempt to put into language, in the shape of an exhaustive definition, exactly the whole state of things, or every state of things, which bring a particular case within the description of an offense of a political character. I wish, however, to express an opinion as to one matter upon which I entertain a very strong opinion. That is, that if the description given by Mr. John Stuart Mill, ‘any offense committed in the course of or furthering of civil war, insurrection, or

political commotion,' were to be construed in the sense that it really means any act which takes place in the course of a political rising without reference to the object and intention of it, and other circumstances connected with it, I should say that it was a wrong definition, and one which could not be legally applied to the words in the Act of Parliament. Sir Charles Russell suggested 'that in the course of' was to be read with the words following, 'or in furtherance of,' and that 'in furtherance of' is equivalent to 'in the course of.' I cannot quite think that this was the intention of the speaker, or is the natural meaning of the expression; but I entirely concur with the observation of the Solicitor-General that in the other sense of the words, if they are not to be construed as merely equivalent expressions, it would be a wrong definition. I think that in order to bring the case within the words of the act and to include extradition for such an act as murder, which is one of the extradition offenses, it must at least be shown that the act is done in furtherance of, done with the intention of assistance, as a sort of overt act in the course of acting in a political matter, a political rising or dispute between two parties in the state as to which is to have the Government in its hands, before it can be brought within the meaning of the words used in the act.

"Sir Charles Russell has argued that in every case it is for the party seeking extradition to bear the onus of affirmatively bringing it within the meaning of those words. On the other hand, it has been contended that if there be an extraditable offense, the onus is upon the person seeking the benefit of those words to show a case in which extradition can be avoided. I do not myself think that it is possible to decide a case such as this, or the true meaning of those words, by applying any such test as on whom is the onus. I do not think it is intended that a scrap of

a *prima facie* case on the one side should have the effect of throwing upon the other side the onus of proving or disproving his position. I look at the words of the act themselves and I think that they are against any such narrow technical mode of dealing with the case. The words of s. 3, subd. I, are 'a fugitive criminal shall not be surrendered if the offense in respect of which his surrender is demanded is one of a political character.' The section itself begins: 'The following restrictions shall be observed with respect to the surrender of fugitive criminals.' There is nothing said as to upon whom is the onus probandi, or that it shall be made to appear by one side or the other in such a case. It is a restriction upon the surrender of a fugitive criminal, and, however it appears, if it does appear, that the act was, in the judgment of the court, an offense which would otherwise be an offense according to the laws of this country, but an offense of a political character, then wholly irrespective of any doctrine of onus on the one side or the other, that is within the jurisdiction, and he cannot be surrendered. It was at first contended, in opposition to the application for a habeas corpus, that if the magistrate upon this question once made up his mind, the court had no jurisdiction to deal with it. It appears to me that this proposition cannot be maintained on the very face of the act itself, which requires by s. II that the magistrate shall inform the prisoner that he may apply for a habeas corpus, and if he is entitled to apply for a habeas corpus, I think it follows that this court must have power to go into the whole matter, and in some cases, certainly if there be fresh evidence, or perhaps upon the same evidence, might take a different view of the matter from that taken by the magistrate.

"It seems to me that it is a question of mixed law and fact — mainly indeed of fact — as to whether the facts are such as to bring the case within the restriction of s. 3, and

to show that it was an offense of a political character. I do not think it is disputed or that now it can be looked upon as in controversy that there was at this time existing in Ticino a state of things which would certainly show that there was more than a mere rising of a few people against the law of the State. I think it is clearly made out by the facts of this case, that there was something of a very serious character going on — amounting, I should go so far as to say, in that small community, to a state of war. There was an armed body of men who had seized arms from the arsenal of the State; they were rushing into the municipal council chamber in which the government of the State used to assemble; they demanded admission; admission was refused; some firing took place; the outer gate was broken down; and I think it also appears perfectly plain from the evidence in the case that Castioni was a person who had been taking part in that movement at a much earlier stage. He was an active party in the movement; he had taken part in the binding of one member of the government. Some time before he arrived with his pistol in his hand at the seat of government, and I think it must be taken that it is quite clear that from the very first, he was an active party, one of the rebellious party who was acting in the attack against the government. Now, that being so, it resolves itself into a small point, depending on the evidence which was taken before the magistrate, and anything that we can collect from the evidence that we have before us and from the whole circumstances of the case.

“ Before dealing with the evidence, I will say one thing about the message which was objected to and which was read after a slight discussion, upon the understanding that we were not going to use that document as evidence of any particular fact, but that it would be only used as an important document showing that the government of the

country had themselves looked upon this as a serious political rising, and a serious state of violence by a very large body of the people against the government. I mean so to use it, and I have never thought of using it in any other way. I think that was the understanding upon which we allowed it to be read, and I feel that I am not justified in using it for any other purpose. Then it is reduced to the question of whether, upon the depositions before the magistrate and upon the fresh facts, if there be any, which are brought before us on the affidavits, we think that this was an act done, not only in the course of a political rising, but as a part of a political rising. Here I must say at once that I assent entirely to the observation that we cannot decide that question merely by considering whether the act done at the moment at which it was done was a wise act in the sense of being an act which the man who did it would have been wise in doing with the view of promoting the cause in which he was engaged. I do not think it would be at all consistent with the real meaning of the words of the statute if we were to attempt so to limit it. I mean, I do not think it would be right to limit it in the way suggested by the cross-examination of Bruni, namely, by considering whether it was necessary at that time that the act should be done. The question really is whether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character with a political object, and as part of the political movement and rising in which he was taking part. Now, the only shadow of a suggestion of evidence to the contrary, I think is the suggestion which appears on the face of some of the documents that he said something about his brother having been assassinated some years before. It was said in the message, which I have already said I do not rely upon as a statement of facts, that he did at the time he fired use the ex-



pression, 'My brother's death cries for vengeance!' That is in the document, and is a statement of fact which I do not rely upon, and I do not think that I am justified in relying upon it, though if I commented on that, I should certainly say it was quite as capable of the construction put upon it by Sir Charles Russell, that he was not intending to murder Rossi, of whom he knew nothing, and of whose connection with any injury towards his brother there is not the slightest particle of evidence, as that it means anything of the kind suggested. Then it amounts to a very little, and it comes to discussion as to the facts of the case, and as to what was taking place at the exact moment at which the shot was fired. I have carefully followed the discussion as to the facts of the case, and if it were necessary I could go through them all one by one, and point out, I think, that, looking at the way in which that evidence was given, and at the evidence itself, there is nothing, in my judgment, to displace the view which I take of the case, that at the moment at which Castioni fired the shot, the reasonable presumption is, not that it is a matter of absolute certainty (we can not be absolutely certain about anything as to men's motives) but the reasonable assumption is that he, at the moment knowing nothing about Rossi, having no spite or ill-will against Rossi, as far as we know, fired that shot; that he fired it thinking it would advance, and that it was an act which was in furtherance of, and done intending it to be in furtherance of the very object which the rising had taken place in order to promote, and to get rid of the government, who, he might, until he had absolutely got into the place, have supposed were resisting the entrance of the people to that place. That, I think, is the fair and reasonable presumption to draw from the facts of the case. I do not know that it is necessary to give any opinion as to the exact moment when the shot was fired; there is some

conflict about it. There is evidence that there was great confusion; there is evidence of shots fired after the shot which Castioni fired; and all I can say is, that looking at it as a question of fact, I have come to the conclusion that at the time at which that shot was fired he acted in the unlawful rising to which at that time he was a party, and an active party — a person who had been doing active work from a very much earlier period, and in which he was still actively engaged. That being so, I think the writ ought to issue, and that we should be acting contrary to the spirit of this enactment, and to the fair meaning of it, if we were to allow him to be detained in custody longer.”

UNITED STATES v. RAUSCHER.

(119 U. S. 407.)

APART FROM TREATY, NO OBLIGATION TO EXTRADITE —  
EXTRADITED PERSON TO BE TRIED ONLY FOR CRIMES FOR  
WHICH HE IS EXTRADITED.

Mr. Justice Miller delivered the opinion of the court.

This case comes before us on a certificate of division of opinion between the Judge holding the Circuit Court of the United States for the Southern District of New York, arising after verdict of guilty, and before judgment, on a motion in arrest of judgment.

The prisoner, William Rauscher, was indicted by a grand jury, for that, on the 9th day of October, 1884, on the high seas, out of the jurisdiction of any particular State of the United States, and within the admiralty and maritime jurisdiction thereof, he, the said William Rauscher, being then and there second mate of the ship J. F. Chapman, unlawfully made an assault upon Janssen, one of the crew of the vessel of which he was an officer, and unlawfully inflicted upon said Janssen cruel and un-

usual punishment. This indictment was found under sec. 5347 of the Revised Statutes of the United States.

The treaty with Great Britain, under which the defendant was surrendered by that government to ours upon a charge of murder, is that of August 9, 1842, styled "A treaty to settle and define the boundaries between the territories of the United States and the possessions of Her Britannic Majesty in North America; for the final suppression of the African slave trade; and for the giving up of criminals, fugitive from justice, in certain cases." 8 Stat. 576.

With the exception of this caption, the tenth article of the treaty contains all that relates to the subject of extradition of criminals. That article is here copied, as follows:—

"It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisition by them, or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other: provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed; and the respective judges and other magistrates of the two governments shall have power, jurisdiction and authority upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judge or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered, and if, on

such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive."

Not only has the general subject of the extradition of persons charged with crime in one country, who have fled to and sought refuge in another, been a matter of much consideration of late years by the executive departments and statesmen of the governments of the civilized portion of the world, by various publicists and writers on international law, and by specialists on that subject, as well as by the courts and judicial tribunals of different countries, but the precise questions arising under this treaty, as presented by the certificate of the judges in this case, have recently been very much discussed in this country and in Great Britain.

It is only in modern times that the nations of the earth have imposed upon themselves the obligation of delivering up these fugitives from justice to the states where their crimes were committed, for trial and punishment. This has been done generally by treaties made by one independent government with another. Prior to these treaties, and apart from them, it may be stated as the general result of the writers upon international law, that there was no well-defined obligation on one country to deliver up such fugitives to another, and though such delivery was often made, it was upon the principle of comity, and within the discretion of the government whose action was invoked; and it has never been recognized as among those obligations of one government towards another which rest upon established principles of international law.

Whether in the United States, in the absence of any treaty on the subject with a foreign nation from whose justice a fugitive may be found in one of the States, and in

the absence of any act of Congress upon the subject, a State can, through its own judiciary or executive, surrender him for trial to such foreign nation, is a question which has been under consideration by the courts of this country without any very conclusive result.

In the case of *Daniel Washburn*, 4 Johns. Ch. 106; *s. c.* 8 Am. Dec. 548, who was arrested on a charge of theft committed in Canada and brought before Chancellor Kent upon a writ of habeas corpus, that distinguished jurist held that, irrespective of all treaties, it was the duty of a State to surrender fugitive criminals. The doctrine of this obligation was presented with great ability by that learned jurist; but shortly afterward Chief Justice Tilghman, in the case of *Short v. Deacon*, 10 S. & R. 125, in the Supreme Court of Pennsylvania, held the contrary opinion—that the delivery up of a fugitive was an affair of the executive branch of the national government, to which the demand of the foreign power must be addressed; that judges could not legally deliver up, nor could they command the executive to do so; and that no magistrate in Pennsylvania had the right to cause a person to be arrested in order to afford the President of the United States an opportunity to deliver him up, because the President had already declared he would not do so.

In the case of *Holmes v. Jennison*, 14 Pet. 540, on a writ of error to the Supreme Court of Vermont, it appears that application had been made to the President for the extradition of Holmes, a naturalized citizen of the United States, who was charged with having committed murder in Lower Canada. There being then no extradition treaty between the two governments, the President declined to act, through an alleged want of power. Holmes having been arrested under authority from Governor Jennison, of Vermont, obtained a writ of habeas corpus from the Supreme Court of that State, and the sheriff

returned that he was detained under an order of the governor, which commanded the sheriff to deliver him up to the authorities of Lower Canada, and the Supreme Court of the State held the return sufficient. On the writ of error from the Supreme Court of the United States two questions were presented, first, whether a writ of error would lie in such case from that court to the Supreme Court of the State; and, second, whether the judgment of the latter court was right. The eight judges who heard the case in this court were equally divided in opinion on the first of these questions, and therefore no authoritative decision of the principal question could be made. A very able and learned opinion in favor of the appellate jurisdiction of the Supreme Court of the United States, and against the right attempted to be exercised by the governor of Vermont, was delivered by Chief Justice Taney, with whom concurred Justices Story, McLean, and Wayne. Justices Thompson, Barbour, and Catron delivered separate opinions, denying the power of the Supreme Court of the United States to revise the judgment of the Supreme Court of Vermont. These latter, with whom concurred Justice Baldwin, did not express any clear opinion upon the power of the authorities of the State of Vermont, either executive or judicial, to deliver Holmes to the government of Canada; but, upon return of the case to the Supreme Court of that State, it seems that the court was satisfied by the arguments of the Chief Justice and those who concurred with him of the error of its position, and Holmes was discharged.

Fortunately, this question, with others which might arise in the absence of treaties or acts of Congress on the subject, is now of very little importance, since, with nearly all the nations of the world with whom our relations are such that fugitives from justice may be found within their dominions or within ours, we have treaties which govern

the rights and conduct of the parties in such cases. These treaties are also supplemented by acts of Congress, and both are in their nature exclusive.

The case we have under consideration arises under one of these treaties made between the United States and Great Britain, the country with which, on account of our intimate relations, the cases requiring extradition are likely to be most numerous. This treaty of 1842 is supplemented by the acts of Congress of August 12, 1848, 9 Stat. 302, and March 3, 1869, 15 Stat. 337, the provisions of which are embodied in sections 5270, 5272, and 5275 of the Revised Statutes, under Title LXVI, Extradition.

The treaty, itself, in reference to the very matter suggested in the questions certified by the judges of the Circuit Court, has been made the subject of diplomatic negotiations between the Executive Department of this country and the government of Great Britain in the Cases of Winslow and Lawrence. Winslow, who was charged with forgery in the United States, had taken refuge in England, and, on demand being made for his extradition, the Foreign Office of that country required a preliminary pledge from our government that it would not try him for any other offense than the forgery for which he was demanded. To this Mr. Fish, the Secretary of State, did not accede, and was informed that the reason of the demand on the part of the British government was that one Lawrence, not long previously extradited under the same treaty, had been prosecuted in the courts of this country for a different offense from that for which he had been demanded from Great Britain, and for the trial of which he was delivered up by that government. Mr. Fish defended the right of the government or state in which the offense was committed to try a person extradited under this treaty for any other criminal offense, as well as for the one for which the extradition had been demanded; while Lord Derby, at the

head of the Foreign Office in England, construed the treaty as requiring the government which had demanded the extradition of an offender against its laws for a prescribed offense, mentioned in the treaty and in the demand for his extradition, to try him for that offense and for no other. The correspondence is an able one upon both sides, and presents the question which we are now required to decide, as to the construction of the treaty and the effect of the acts of Congress already cited, and of a statute of Great Britain of 1870 on the same subject. The negotiations between the two governments, however, on that subject were inconclusive in any other sense than that Winslow was not delivered up and Lawrence was never actually brought to judgment for any other offense than that for which his extradition was demanded.

The question was also discussed in the House of Lords, and Lord Derby stated and defended his views of the construction of the treaty with marked ability, while he conceded that the act of Parliament on that subject, which declared that the person extradited could be tried for no other offense than that for which he had been demanded, had no obligatory force upon the United States as one of the parties to the treaty. *Foreign Relations of the United States, 1876-7*, pp. 204-307.

The subject was also very fully discussed by Mr. William Beach Lawrence, a very learned authority on matters of international law living in this country, in several published articles. *Albany Law Journal*, vol. 14, p. 85; vol. 15, p. 224; vol. 16, p. 361. In these the author, with his usual ability, maintains the proposition, that a person delivered up under this treaty on a demand charging him with a specific offense, mentioned in it, can only be tried by the country to which he is delivered for that specific offense, and is entitled, unless found guilty of that, to be restored in safety to the country of his asylum at the time of his extradition.



A very able article arising out of the same public discussion at that time, to wit, 1876, is found in the *American Law Review*, said to have been written by Judge Lowell, of the United States Court at Boston, in which, after an examination of the authorities upon the general rule, independent of treaties, as found in the continental writers on international law, he says, that rule is, that the person whose extradition has been granted, cannot be prosecuted and tried except for the crime for which his extradition has been obtained; and entering upon the question of the construction of the treaty of 1842, he gives to it the same effect in regard to that matter. 10 *Am. Law Review* 1875-6, p. 617.

Mr. David Dudley Field, in his draft of an outline for an international code published about the same time, adopts the same principle. Field's *International Code*, section 237, p. 122. It is understood that the rule which he lays down represents as well what he understands to be existing law, as also what he supposes it should be.

A very learned and careful work, published in this country by Mr. Spear, in 1879, and a second edition in 1884, after considering all the correspondence between our government and Great Britain upon the subject, the debate in the House of Lords, the articles of Mr. Lawrence and Judge Lowell, as well as the treatise of Mr. Clarke, an English writer, with a very exhaustive examination of all the decisions in this country relating to this matter, arrives at the same conclusion. This examination by Mr. Spear is so full and careful, that it leaves nothing to be desired in the way of presentation of authorities.

The only English work on the subject of extradition we have been able to find which discusses this subject is a small manual by Edward Clarke of Lincoln's Inn, published in 1867. He adopts the same view of the construction of this treaty and of the general principles of inter-

national law upon the subject which we have just indicated.

Turning to seek in judicial decisions for authority upon the subject, as might be anticipated we meet with nothing in the English courts of much value, for the reason that treaties made by the Crown of Great Britain with other nations are not in those courts considered as part of the law of the land, but the rights and the duties growing out of those treaties are looked upon in that country as matters confided wholly for their execution and enforcement to the executive branch of the government. Speaking of the Ashburton treaty of 1842, which we are now construing, Mr. Clarke says, that, "in England the common law being held not to permit the surrender of a criminal, this provision could not come into effect without an act of Parliament, but in the United States a treaty is as binding as an Act of Congress." Clarke of Extradition, 38.

This difference between the judicial powers of the courts of Great Britain and of this country in regard to treaties is thus alluded to by Chief Justice Marshall in the Supreme Court of the United States: —

"A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature

must execute the contract before it can become a rule for the court." *Foster v. Neilson*, 2 Pet. 253, 314.

This whole subject is fully considered in the *Head Money Cases*, 112 U. S. 580, in which the effect of a treaty as a part of the law of the land, as distinguished from its aspect as a mere contract between independent nations, is expressed in the following language: —

"A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement between private parties in the courts of the country. An illustration of this character is found in treaties which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that 'this Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land.' A treaty, then, is a law of the land, as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined, And when such rights are of a nature to be enforced in a

court of justice, that court resorts to the treaty for a rule of decisions for the case before it as it would to a statute." Pp. 598-9. See also *Chew Heong v. United States*, 112 U. S. 536, 540, 565.

The treaty of 1842 being, therefore, the supreme law of the land, which the courts are bound to take judicial notice of, and to enforce in any appropriate proceeding the rights of persons growing out of that treaty, we proceed to inquire, in the first place, so far as pertinent to the questions certified by the circuit judges, into the true construction of the treaty. We have already seen that, according to the doctrine of publicists and writers on international law, the country receiving the offender against its laws from another country has no right to proceed against him for any other offense than that for which he has been delivered up. This is a principle which commends itself as an appropriate adjunct to the discretionary exercise of the power of rendition, because it can hardly be supposed that a government which was under no treaty obligation nor any absolute obligation of public duty to seize a person who had found an asylum within its bosom and turn him over to another country for trial, would be willing to do this, unless a case was made of some specific offense of a character which justified the government in depriving the party of his asylum. It is unreasonable that the country of the asylum should be expected to deliver up such person to be dealt with by the demanding government without any limitation, implied or otherwise, upon its prosecution of the party. In exercising its discretion, it might be very willing to deliver up offenders against such laws as were essential to the protection of life, liberty, and person, while it would not be willing to do this on account of minor misdemeanors or of a certain class of political officers in which it would have no interest or sympathy. Accordingly, it has been the policy of all governments to grant an asylum to persons who have

fled from their homes on account of political disturbances, and who might be there amenable to laws framed with regard to such subjects, and to the personal allegiance of the party. In many of the treaties of extradition between the civilized nations of the world, there is express exclusion of the right to demand the extradition of offenders against such laws, and in none of them is this class of offenses mentioned as being the foundation of extradition proceedings. Indeed, the enumeration of offenses in most of these treaties, and especially in the treaty now under consideration, is so specific, and marked by such a clear line in regard to the magnitude and importance of those offenses, that it is impossible to give any other interpretation to it than that of the exclusion of the right of extradition for any others.

It is, therefore, very clear that this treaty did not intend to depart in this respect from the recognized public law which had prevailed in the absence of treaties, and that it was not intended that this treaty should be used for any other purpose than to secure the trial of the person extradited for one of the offenses enumerated in the treaty. This is not apparent from the general principle that the specific enumeration of certain matters and things implied the exclusion of all others, but the entire face of the treaty, including the processes by which it is to be carried into effect, confirms this view of the subject. It is unreasonable to suppose that any demand for rendition framed upon a general representation to the government of the asylum, (if we may use such an expression,) that the party for whom the demand was made was guilty of some violation of the laws of the country which demanded him, without specifying any particular offense with which he was charged, and even without specifying an offense mentioned in the treaty, would receive any serious attention; and yet such is the effect

of the construction that the party is properly liable to trial for any other offense than that for which he was demanded, and which is described in the treaty. There would, under that view of the subject, seem to be no need of a description of a specific offense in making the demand. But, so far from this being admissible, the treaty not only provides that the party shall be charged with one of the crimes mentioned, to wit, murder, assault with intent to commit murder, piracy, arson, robbery, forgery, or the utterance of forged paper, but that evidence shall be produced to the judge or magistrate of the country of which such demand is made, of the commission of such an offense, and that this evidence shall be such as according to the law of that country would justify the apprehension and commitment for trial of the person so charged. If the proceedings under which the party is arrested in a country where he is peaceably and quietly living, and to the protection of whose laws he is entitled, are to have no influence in limiting the prosecution in the country where the offense is charged to have been committed, there is very little use for this particularity in charging a specific offense, requiring that offense to be one mentioned in the treaty, as well as sufficient evidence of the party's guilt to put him upon trial for it. Nor can it be said that, in the exercise of such a delicate power under a treaty so well guarded in every particular, its provisions are obligatory alone on the State which makes the surrender of the fugitive, and that that fugitive passes into the hands of the country which charges him with the offense, free from all the positive requirements and just implications of the treaty under which the transfer of his person takes place. A moment before he is under the protection of a government which has afforded him an asylum from which he can only be taken under a very limited form of procedure, and a moment after he is

found in the possession of another sovereign by virtue of that proceeding, but divested of all the rights which he had the moment before, and of all the rights which the law governing that proceeding was intended to secure.

If upon the face of this treaty it could be seen that its sole object was to secure the transfer of an individual from the jurisdiction of one sovereign to that of another, the argument might be sound; but as this right of transfer, the right to demand it, the obligation to grant it, the proceedings under which it takes place, all show that it is for a limited and defined purpose that the transfer is made it is impossible to conceive of the exercise of jurisdiction in such a case for any other purpose than that mentioned in the treaty, and ascertained by the proceedings under which the party is extradited, without an implication of fraud upon the rights of the party extradited, and of bad faith to the country which permitted his extradition. No such view of solemn public treaties between the great nations of the earth can be sustained by a tribunal called upon to give judicial construction to them.

The opposite view has been attempted to be maintained in this country upon the ground that there is no express limitation in the treaty of the right of the country in which the offense was committed to try the person for the crime alone for which he was extradited, and that once being within the jurisdiction of that country, no matter by what contrivance or fraud or by what pretense of establishing a charge provided for by the extradition treaty he may have been brought within the jurisdiction, he is, when here, liable to be tried for any offense against the laws as though arrested here originally. This proposition of the absence of express restriction in the treaty of the right to try him for other offenses than that for which he was extradited, is met by the manifest scope and object of the treaty itself. The caption of the treaty, already quoted, declaring that

its purpose is to settle the boundary line between the two governments; to provide for the final suppression of the African slave trade; adds, "and for the giving up of criminals, fugitives from justice, in certain cases." The treaty, then, requires, as we have already said, that there shall be given up, upon requisition respectively made by the two governments, all persons charged with any of the seven crimes enumerated, and the provisions giving a party an examination before a proper tribunal, in which, before he shall be delivered up on this demand, it must be shown that the offense for which he is demanded is one of those enumerated, and that the proof is sufficient to satisfy the court or magistrate before whom this examination takes place that he is guilty, and such as the law of the State of the asylum requires to establish such guilt, leave no room to doubt that the fair purpose of the treaty is, that the person shall be delivered up to be tried for that offense and for no other.

If there should remain any doubt upon this construction of the treaty itself, the language of two acts of Congress, heretofore cited, incorporated in the Revised Statutes, must set this question at rest. It is there declared, Rev. Stat. Section 5272, the two preceding sections having provided for a demand upon this country and for the inquiry into the guilt of the party, that "it shall be lawful for the Secretary of State, under his hand and seal of office, to order the person so committed to be delivered to such person or persons as shall be authorized, in the name and on behalf of such foreign government to be tried for the crime of which such persons shall be delivered up accordingly."

For the protection of persons brought into this country by extradition proceedings from a foreign country, section 5275 of the Revised Statutes provides:—

"Whenever any person is delivered by any foreign gov-



ernment to an agent of the United States, for the purpose of being brought within the United States and tried for any crime for which he is duly accused, the President shall have power to take all necessary measures for the transportation and safe-keeping of such accused person, and for his security against lawless violence, until the final conclusion of his trial for the crimes or offenses specified in the warrant or extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offenses, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States, or of the militia thereof, as may be necessary for the safe-keeping and protection of the accused."

The obvious meaning of these two statutes, which have reference to all treaties of extradition made by the United States, is that the party shall not be delivered up by this government to be tried for any other offense than that charged in the extradition proceedings; and that, when brought into this country upon similar proceedings, he shall not be arrested or tried for any other offense than that with which he was charged in those proceedings, until he shall have had a reasonable time to return unmolested to the country from which he was brought. This is undoubtedly a congressional construction of the purpose and meaning of extradition treaties such as the one we have under consideration, and whether it is or not, it is conclusive upon the judiciary of the right conferred upon persons brought from a foreign country into this under such proceedings.

The right, as we understand it, is that he shall be tried only for the offense with which he is charged in the extradition proceedings and for which he was delivered up, and that if not tried for that or after trial and acquittal, he shall have a reasonable time to leave the country before he is arrested

upon the charge of any other crime committed previous to his extradition.

**NEELY v. HENKEL.**

(180 U. S. 109.)

**EXTRADITION BETWEEN "OCCUPIED TERRITORY AND OCCUPYING STATE."**

Mr. Justice Harlan delivered the opinion of the court. After referring to section 5270 of the Revised Statutes and the amendment to this of June 6th, 1900, he said: —

On the 28th day of June, 1900, a warrant was issued by Judge Lacombe of the Circuit Court of the United States for the Southern District of New York commanding the arrest of Charles F. W. Neely, who ' being then and there a public employé, to wit, Finance Agent of the Department of Posts in the City of Havana, Island of Cuba, on the 6th day of May in the year of our Lord one thousand nine hundred, or about that time, having then and there charge of the collection and deposit of moneys of the Department of Posts of the said city of Havana, did unlawfully and feloniously take and embezzle from the public funds of the said Island of Cuba the sum of ten thousand dollars and more, being then and there moneys and funds which had come into his charge and under his control in his capacity as such public employé and finance agent, as aforesaid, and by reason of his said office and employment, thereby violating chapter 10, article 401, of the penal code of the said Island of Cuba — that is to say, a crime within the meaning of the said act of Congress, approved June 6, 1900, as aforesaid, relating to the 'embezzlement or criminal malversation of the public funds committed by public officers, employés, or depositaries. The warrant directed the accused to be brought before the judge in order that the evidence of probable cause as to his guilt could be heard and considered, and, if deemed sufficient,

that the same might be certified with a copy of all the proceedings to the Secretary of State, that an order might issue for his return and surrender pursuant to the authority of the above act of Congress.

The warrant of arrest was based on a verified written complaint of an Assistant United States Attorney for the Southern District of New York.

On the same day and upon a like complaint a warrant was issued against Neely by the same judge, commanding his arrest for the crime of having unlawfully and fraudulently—while employed in and connected with the business and operations of a branch of the service of the Department of Posts in Havana, Cuba, between July 1st, 1899, and May 1, 1900—embezzled and converted to his own use postage stamps, moneys, funds and property belonging to and in the custody of that Department which had come into his custody and under his authority as such employé, to the amount of \$57,000, in violation of sections 37 and 55 of the Postal Code of Cuba.

Neely having been arrested under these warrants application was made by the United States for his extradition to Cuba. The accused moved to dismiss the complaints upon various grounds. That motion having been denied, the case was heard upon evidence.

The application for the writ of habeas corpus having been denied and an appeal having been duly taken, the petitioner was remanded to the custody of the marshal to await the determination of such appeal in this court. \* \* \*

1. That at the date of the act of June 6, 1900, the Island of Cuba was “occupied by” and was “under the control of the United States” and that it is still so occupied and controlled, cannot be disputed. This court will take judicial notice that such were, at the date named and are now, the relations between this country and Cuba. So that the applicability of the above act to the present case—and

this is the first question to be examined — depends upon the inquiry whether, within its meaning, Cuba is to be deemed a foreign country or territory.

We do not think this question at all difficult of solution if regard be had to the avowed objects intended to be accomplished by the war with Spain and by the military occupation of that island. Let us see what were those objects as they are disclosed by official documents and by the public acts of the representatives of the United States.

On the 20th day of April, 1898, Congress passed a joint resolution, the preamble of which recited that the abhorrent conditions existing for more than three years in the Island of Cuba, so near our own borders, had shocked the moral sense of the people of the United States, had been a disgrace to civilization, culminating in the destruction of a United States battleship, with two hundred and sixty-six of its officers and crew, while on a friendly visit in the harbor of Havana, and could not longer be endured. It was, therefore, resolved: “1. That the people of the Island of Cuba are, and of right ought to be, free and independent. 2. That it is the duty of the United States to demand, and the Government of the United States does hereby demand, that the Government of Spain at once relinquish its authority and government in the Island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters. 3. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into actual service of the United States the militia of the several States, to such an extent as may be necessary to carry these resolutions into effect. 4. That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction or control over said island except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the

government and control of the island to its people." 30 Stat. 738.

The adoption of this joint resolution was followed by the act of April 25, 1898, by which Congress declared: " 1. That war be, and the same is, hereby declared to exist, and that war has existed since the 21st day of April, 1898, including said day, between the United States of America and the Kingdom of Spain. 2. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into actual service of the United States the militia of the several States, to such an extent as may be necessary to carry this act into effect." 30 Stat. 364, c. 189.

The war lasted but a few months. The success of the American arms was so complete and overwhelming that a Protocol of Agreement between the United States and Spain embodying the terms of a basis for the establishment of peace between the two countries was signed at Washington on the 12th of August, 1898. By that agreement it was provided that " Spain will relinquish all claim of sovereignty over and title to Cuba," and that the respective countries would each appoint commissioners to meet at Paris and there proceed to the negotiation and conclusion of a treaty of peace. 30 Stat. 1742.

On the 13th of December, 1898, an order was issued by the Secretary of War stating that, by direction of the President, a division to be known as the Division of Cuba consisting of the geographical departments and provinces of the Island of Cuba, with headquarters at Havana, was created and placed under the command of Major General John R. Brooke, United States Army, who was required, in addition to his command of the troops in the Division, to " exercise the authority of Military Governor of the Island." And on December 28, 1898, General Brooke, by a formal

order, in accordance with the order of the President, assumed command of that Division, and announced that he would exercise the authority of Military Governor of the island.

On the 1st day of January, 1899, at the palace of the Spanish Governor-General in Havana, the sovereignty of Spain was formally relinquished and General Brooke immediately entered upon the full exercise of his duties as Military Governor of Cuba.

On the 11th day of January, 1899, the Military Governor, "in pursuance of the authority vested in him by the President of the United States, and in order to secure a better organization of the civil service in the Island of Cuba," ordered that thereafter "the civil government shall be administered by four Departments, each under the charge of its appropriate Secretary," to be known, respectively, as the Departments of State and Government, of Finance, of Justice and Public Instruction, and of Agriculture, Commerce, Industries and Public Works, each under the charge of a Secretary. To these Secretaries "were transferred, by the officers in charge of them, the various bureaus of the Spanish civil government." Subsequently, by order of the Military Governor, a Supreme Court for the island was created, with jurisdiction throughout the Cuban territory, composed of a President or Chief Justice, six Associate Justices, one Fiscal, two Assistant Fiscals, one Secretary or Chief Clerk, two Deputy Clerks, and other subordinate employés, with administrative functions, as well as those of a court of justice in civil and criminal matters. By order of later date, issued by the Military Governor, the jurisdiction of the ordinary courts of criminal jurisdiction was defined.

Under date of July 21, 1899, by direction of the Military Governor, a code known as the Postal Code was promulgated and declared to be the law relating to postal affairs

in Cuba. The Code abrogated all the laws then existing in Cuba inconsistent with its provisions. It provided that the Director General of Posts of the Island should have the control and management of the Department of Posts and prescribed numerous criminal offenses, affixing the punishments of each. It is not disputed that one of the offenses charged against Neely is included in those defined in the Postal Code established by the Military Governor of Cuba, and that the other is embraced by the Penal Code of that island which was in force when the war ensued with Spain, and which by order of the Military Governor remained in force, subject to such modifications as might be found necessary in the interest of good government.

On the 13th day of June, 1900, the present Military Governor for Cuba, General Leonard Wood, made his requisition upon the President for the extradition of Neely under the act of Congress.

The facts above detailed make it clear that within the meaning of the act of June 6, 1900, Cuba is foreign territory. It cannot be regarded, in any constitutional, legal or international sense, a part of the territory of the United States.

While by the act of April 25, 1898, declaring war between this country and Spain, the President was directed and empowered to use our entire land and naval forces, as well as the militia of the several States, to such extent as was necessary, to carry such act into effect, that authorization was not for the purpose of making Cuba an integral part of the United States but only for the purpose of compelling the relinquishment by Spain of its authority and government in that island and the withdrawal of its forces from Cuba and Cuban waters. The legislative and executive branches of the Government, by the joint resolution of April 20, 1898, expressly disclaimed any purpose to exercise sovereignty, jurisdiction or control over Cuba.

“except for the pacification thereof,” and asserted the determination of the United States, that object being accomplished, to leave the government and control of Cuba to its own people. All that has been done in relation to Cuba has had that end in view and, so far as the court is informed by the public history of the relations of this country with that island, nothing has been done inconsistent with the declared object of the war with Spain.

Cuba is none the less foreign territory, within the meaning of the act of Congress, because it is under a military Governor appointed by and representing the President in the work of assisting the inhabitants of that island to establish a government of their own, under which, as a free and independent people, they may control their own affairs without interference by other nations. The occupancy of the island by troops of the United States was the necessary result of the war. That result could not have been avoided by the United States consistently with the principles of international law or with its obligations to the people of Cuba.

It is true that as between Spain and the United States — indeed, as between the United States and all foreign nations — Cuba, upon the cessation of hostilities with Spain and after the Treaty of Paris, was to be treated as if it were conquered territory. But as between the United States and Cuba that island is territory held in trust for the inhabitants of Cuba to whom it rightfully belongs and to whose exclusive control it will be surrendered when a stable government shall have been established by their voluntary action.

II. It is contended that the act of June 6, 1900, is unconstitutional and void in that it does not secure to the accused, when surrendered to a foreign country for trial in its tribunals, all of the rights, privileges and immunities that are guaranteed by the Constitution to persons charged



with the commission in this country of crimes against the United States. Allusion is made here to the provisions of the Federal Constitution relating to the writ of habeas corpus, bills of attainder, ex post facto laws, trial by jury for crimes, and generally to be fundamental guarantees of life, liberty and property embodied in that instrument. The answer to this suggestion is that those provisions have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country.

In connection with the above proposition, we are reminded of the fact that the appellant is a citizen of the United States. But such citizenship does not give him an immunity to commit crime in other countries, nor entitle him to demand, of right, a trial in any other mode than that allowed to its own people by the country whose laws he has violated and from whose justice he has fled. When an American citizen commits a crime in a foreign country he cannot complain if required to submit to such modes of trial and to such punishment as the laws of the country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States. By the act in question the appellant cannot be extradited except upon the order of a judge of a court of the United States and then only upon evidence establishing probable cause to believe him guilty of the offense charged; and when tried in the country to which he is sent, he is secured by the same act, "a fair and impartial trial" — not necessarily a trial according to the modes established in the country where the crime was committed, provided such trial be had without discrimination against the accused because of his American citizenship. In the judgment of Congress these provisions were deemed adequate to the ends of justice in cases of persons committing crimes in a foreign country or territory "occupied by or under the control of the United

States," and subsequently fleeing to this country We cannot adjudge that Congress in this matter has abused its discretion, nor decline to enforce obedience to its will as expressed in the act of June 6, 1900.

III. Another contention of the appellant is that as Congress, by the joint resolution of April 20, 1898, declared that "the people of Cuba are, and of right ought to be free and independent" and as peace has existed since, at least, the military forces of Spain evacuated Cuba on or about January, 1899, the occupancy and control of that island, under the military authority of the United States, is without warrant in the Constitution and an unauthorized interference with the internal affairs of a friendly power; consequently it is argued the appellant should not be extradited for trial in the courts established under the orders issued by the Military Governor of the Island. In support of this proposition it is said that the United States recognized the existence of the Republic of Cuba, and that the war with Spain was carried on jointly by the allied forces of the United States and of that Republic.

Apart from the view that it is not competent for the judiciary to make any declaration upon the question of the length of time during which Cuba may be rightly occupied and controlled by the United States in order to effect its pacification — it being the function of the political branch of the Government to determine when such occupation and control shall cease, and therefore when the troops of the United States shall be withdrawn from Cuba — the contention that the United States recognized the existence of an established government known as the Republic of Cuba, but is now using its military or executive power to displace or overthrow it, is without merit. The declaration by Congress that the people of Cuba were and of right ought to be free and independent was not intended as a recognition of the existence of an organized government instituted by the people

of that island in hostility to the government maintained by Spain. Nothing more was intended than to express the thought that the Cubans were entitled to enjoy — to use the language of the President in his message of December 5, 1897 — that “measure of self-control which is the inalienable right of man, protected in their right to reap the benefit of the exhaustless treasure of their country.” In the same message the President said: “It is seriously to be considered whether the Cuban insurrection possesses beyond dispute the attributes of statehood, which alone can demand the recognition of belligerency in its favor. The same requirement must be certainly no less seriously considered when the graver issue of recognizing independence is in question.” Again, in his message of April 11, 1898, referring to the suggestion that the independency of the Republic of Cuba should be recognized before the country entered upon war with Spain, he said: “Such recognition is not necessary in order to enable the United States to intervene and pacify the island. To commit this country now to the recognition of any particular government in Cuba might subject us to embarrassing conditions of international obligations toward the organization to be recognized. In case of intervention our conduct would be subject to the approval or disapproval of such government. We should be obliged to submit to its direction and to assume to it the mere relation of a friendly ally.” To this may be added the significant fact that the first part of the joint resolution, as originally reported from the senate committee read as follows: “That the people of the Island of Cuba are and of right ought to be free and independent, *and that the government of the United States hereby recognizes the Republic of Cuba as the true and lawful government of the Island.*” But upon full consideration the views of the President received the sanction of Congress, and the words in italics were stricken out.

It thus appears that both the legislative and executive branches of the government concurred in not recognizing the existence of any such government as the Republic of Cuba. It is true that the co-operation of troops commanded by Cuban officers was accepted by the military authorities of the United States in its efforts to overthrow its Spanish authority in Cuba. Yet from the beginning to the end of the war the supreme authority in all military operations in Cuba and in Cuban waters against Spain was with the United States, and those operations were not in any sense under the control or direction of the troops commanded by Cuban officers.

We are of opinion, for the reasons stated, that the act of June 6, 1900, is not in violation of the Constitution of the United States, and that this case comes from within the provisions of that act. The court below having found that there was probable cause to believe the appellant guilty of the offenses charged, the order for his extradition was proper, and no ground existed for his discharge on habeas corpus.

The judgment of the Circuit Court is, therefore, affirmed.

**COSGROVE v. WINNEY.**

(177 U. S. 64.)

**RIGHT OF EXTRADITED PERSON TO RETURN HOME AFTER TRIAL FOR OFFENSE FOR WHICH HE WAS EXTRADITED.**

November 7, 1895, Winney, United States marshal for the Eastern District of Michigan, made a complaint before one of the police justices of the city of Detroit within that district against Thomas Cosgrove for the larceny of a boat, named the Aurora, her tackle, etc., whereon a warrant issued for his arrest. Cosgrove was a resident of Sarnia, in the Province of Ontario, Dominion of Canada, and extradition proceedings were had in accordance with the

treaty between the United States and Great Britain, which resulted in a requisition on the Canadian Government, which was duly honored, and a surrendering warrant issued May 19, 1896, on which Cosgrove was brought to Detroit to respond to the charge aforesaid; was examined in the police court of Detroit; was bound over to the July term, 1896, of the recorder's court of that city; and was by that court held for trial, and furnished bail. He thereupon went to Canada, but came back to Detroit in December, 1896.

December 3, 1895, a *capias* issued out of the District Court of the United States for the Eastern District of Michigan, on an indictment against Cosgrove, on the charge of obstructing the United States marshal in the execution of a writ of attachment, which was not served until December 10, 1896, some months after Cosgrove had been admitted to bail in the recorder's court.

Cosgrove having been taken into custody by the marshal applied to the District Court for a writ of *habeas corpus*, which was issued, the marshal made return, and the cause was duly argued.

The court entered a final order denying the application and remanding the petitioner. From this order an appeal was taken to the Circuit Court of Appeals, and there dismissed, whereupon an appeal to this court was allowed, and Cosgrove discharged on his own recognizance.

The district judge stated in his opinion that it appeared "that the property, for the taking of which he (Cosgrove) is charged with larceny, was the vessel which, under the indictment in this court, he was charged with having unlawfully taken from the custody of the United States marshal, while the same was held under a writ of attachment issued from the District Court in admiralty."

And further: "The only question which arises under this treaty therefore is whether upon the facts stated in

the return which was not traversed, the petitioner has had the opportunity secured him by that treaty to return to his own country. If he has had such opportunity, then article 3 has not been violated, either in its letter or spirit, by the arrest and detention of the petitioner. It is conceded that he was delivered to the authorities of the State of Michigan in May, 1896, to stand his trial upon the charge of larceny. He gave bail to appear for trial in the recorder's court when required and immediately returned to Canada. On December 10, 1896, he voluntarily appeared in the State of Michigan, of his own motion, and not upon the order of the recorder's court, or at the instance of his bail, and while in this district was arrested."

Mr. Chief Justice Fuller delivered the opinion of the court.

Article three of the Extradition Convention between the United States and Great Britain, promulgated March 25, 1890, 26 Stat. 1508, and section 5275 of the Revised Statutes, are as follows: —

"Article III. No person surrendered by or to either of the High Contracting Parties shall be triable or be tried for any crime or offense, committed prior to his extradition, other than the offense for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered."

"Sec. 5275. Whenever any person is delivered by any foreign government to an agent of the United States, for the purpose of being brought within the United States and tried for any crime of which he is duly accused, the President shall have power to take all necessary measures for the transportation and safekeeping of such accused person, and for his security against lawless violence, until the final conclusion of his trial for the crimes or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such

crimes or offenses, and for a reasonable time thereafter, and may employ such portion of the land and naval forces of the United States, or of the militia thereof, as may be necessary for the safekeeping and protection of the accused."

Cosgrove was extradited under the treaty, and entitled to all the immunities accorded to a person so situated; and it is admitted that the offense for which he was indicted in the District Court was committed prior to his extradition, and was not extraditable. But it is insisted that although he could not be extradited for one offense and tried for another, without being afforded the opportunity to return to Canada, yet as, after he had given bail, he did so return, his subsequent presence in the United States was voluntary and not enforced, and therefore he had lost the protection of the treaty and rendered himself subject to arrest on the *capias* and to trial in the District Court for an offense other than that on which he was surrendered, and this although the prosecution in the State court was still pending and undetermined, and Cosgrove had not been released or discharged therefrom.

Conceding that if Cosgrove had remained in the State of Michigan and within reach of his bail, he would have been exempt, the argument is that, as he did not continuously so remain, and, during his absence in Canada, his sureties could not have followed him there and compelled his return, if his appearance happened to be required according to the exigency of the bond, which the facts stated show that it was not, it follows that when he actually did come back to Michigan he had lost his exemption.

But we cannot concur in this view. The treaty and statute secured to Cosgrove a reasonable time to return to the country from which he was surrendered, after his discharge from custody or imprisonment for or on account of the offense for which he had been extradited, and at

the time of his arrest he had not been so discharged by reason of acquittal; or conviction and compliance with sentence; or the termination of the State prosecution in any way. *United States v. Rauscher*, 119 U. S. 407, 436.

The mere fact that he went to Canada did not in itself put an end to the prosecution or to the custody in which he was held by his bail, or even authorize the bail to be forfeited, and when he re-entered Michigan, he was as much subject to the compulsion of his sureties as if he had not been absent.

In *Taylor v. Taintor*, 16 Wall. 366, 371, Mr. Justice Swayne, speaking for the court, said: "When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another State; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. It is likened to the rearrest by the sheriff of an escaping prisoner. In 6 Modern, 231, it is said: 'The bail have their principal on a string, and may pull the string whenever they please, and render him in their discharge.' The rights of the bail in civil and criminal cases are the same. They may doubtless permit him to go beyond the limits of the State within which he is to answer, but it is unwise and imprudent to do so; and if any evil ensue, they must bear the burden of the consequences, and cannot cast them upon the obligee."

We think the conclusion cannot be maintained on this record that, because of Cosgrove's temporary absence, he had waived or lost an exemption which protected him



while he was subject to the State authorities to answer for the offense for which he had been extradited.

The case is a peculiar one. The marshal initiated the prosecution in the State courts, and some weeks thereafter the indictment was found in the District Court for the same act on which the charge in the State courts was based. The offenses, indeed, were different, and different penalties were attached to them. But it is immaterial that Cosgrove might have been liable to be prosecuted for both, as that is not the question here, which is whether he could be arrested on process from the District Court before the prior proceeding had terminated and he had had opportunity to return to the country from which he had been taken.

Or, rather, whether the fact of his going to Canada pending the State proceedings deprived him of the immunity he possessed by reason of his extradition so that he could not claim it though the jurisdiction of the State courts had not been exhausted; he had come back to Michigan; and he had had no opportunity to return to Canada after final discharge from the State prosecution

We are of opinion that, under the circumstances, Cosgrove retained the right to have the offense for which he was extradited disposed of and then to depart in peace, and that this arrest was in abuse of the high process under which he was originally brought into the United States, and cannot be sustained.

Final order reversed and cause remanded with a direction to discharge petitioner.

## CHAPTER IX.

### INTERVENTION.

**An extraordinary remedy.**

Intervention is an extraordinary remedy for wrongs which apparently cannot be remedied in any other way. While not all interventions are illegal, the principle that each independent state is entitled to freedom from interference in its affairs by all other states is so well recognized in international law that any violation of it is *prima facie* illegal. Therefore, the burden of proof is upon the intervening state to show that its act is a legal one.

**Not all interference, intervention.**

Not every interference in the affairs of another state amounts to an intervention. When, recently, President Roosevelt suggested, in a friendly way, to Russia and Japan that the time had come for them to enter into negotiations with a view to ending the war, there was in this no act of intervention. In order to constitute intervention as that term is used in international law, there must be the use of force or a threat, naked or veiled, to use it.

**Intervention in pursuance of a treaty.**

Intervention may be in pursuance of a treaty, as when England intervened to protect the neutrality of Belgium in 1870. When such is the case there is general agreement as to the legal right to intervene. Whatever one may think of the policy of entering into such treaties, it is entirely legal for a state to do so if it wishes. If, then, the treaty itself is legal, it follows that the act which it contemplates is legal, for no treaty to perform an illegal act would be legal.

**A mixed question of law and fact.**

But the great bulk of interventions are not entered into in pursuance of treaties. It is therefore necessary to inquire for what purpose there may be a legal intervention, independently of treaty? It is a most difficult matter to lay down any rules in advance which will govern in all cases.

This difficulty would be greatly lessened, if in each case there were an agreement as to the facts. But usually there is not, so that the question becomes one of mixed law and fact. Neither does it require an exceptionally profound knowledge of human nature or of political science to appreciate how differently the facts may appear when viewed from the standpoint of the intervening state to what they do when viewed from the standpoint of the state against which intervention is directed.

As the question is one which from its nature rarely comes before the courts, we are forced to rely largely upon the writings of publicists in reaching a conclusion as to what causes have been considered a sufficient justification for intervention. Not decided by courts.

Most writers are agreed, and, in fact, it is hard to escape the conclusion that self-preservation is a sufficient justification for intervention. Yet care must be taken so as not to give to the term self-preservation too wide a meaning. In order to call this law into operation, the threatened injury must be immediate, serious, and there must be apparently no other way of averting it. Self-preservation.

That the first of these requisites may be complied with it must appear that the danger is not one which in course of years will result from the uninterrupted development of a neighboring state. Were it so, the self-preservation of a state might always be said to be threatened and this threat made the excuse for intervention, provided a state is situated in the midst of prosperous neighbors. To violate the independence of a state to-day in order that there may be peace a hundred years hence is certainly not in accord with the rules of international law. Danger must be immediate.

Nor is it every danger, even though immediate, which is of sufficient moment to warrant the risk of war which the intervening state always incurs — a risk far too great to be assumed unless there is a most serious injury to be Not every immediate danger sufficient.

averted thereby. There is neither moral nor legal justification for a resort to intervention for the protection of merely formal or technical rights.

No less hazardous remedy available.

But granted that the danger to be averted is immediate and serious, intervention is not justifiable if there is another remedy less hazardous, which may reasonably be expected to accomplish the end. Just as in disputes between individuals, extraordinary remedies are not allowed, if there is a legal remedy, so in international disputes extraordinary remedies are not to be resorted to, unless there is no other remedy available.

Line of succession.

It has been held that intervention to preserve the rights of succession in a certain line is justifiable, but this is no longer sanctioned by international law. If England should want to exclude the son of Edward VII. as it excluded James II., it has a right to do so and no other state would be warranted in intervening to prevent it.

To put down revolution.

It has been attempted to justify intervention for the purpose of putting down revolution, but such a proposition is untenable. One of the fundamental rights of a state is that of changing its form of government. Such a right is inseparable from the right of independence.

Request of factions to civil war.

Neither is intervention at the request of one of the parties to a civil war justifiable. Because such party is not necessarily voicing the will of the state and the right of a state to determine its own form of government cannot be legally surrendered, except by the will of the state.

To maintain balance of power.

Intervention to maintain the balance of power may or may not be justifiable, depending upon the way in which the balance of power is threatened. If by the natural healthy growth of a state, then certainly no intervention is warranted to prevent a change brought about in this way. But if, upon the other hand, the change is brought about suddenly by the unwarranted aggressions of a strong upon a weaker state resulting in the absorption of the

greater part of the latter by the former, then-intervention may be justifiable.

It is doubtful if intervention upon the ground of humanity is justifiable. The term is so general that it lends **Humanity.** itself most readily to abuse. It is so easy for a conquering state to adjudge the acts of others inhuman if by righting those wrongs they may fall heir to their estates. It seems to be reasonably well settled that intervention upon the ground of humanity is not justifiable, unless the interests of the intervening state are directly affected by the inhuman or immoral acts of the other. No state has a commission from heaven to right the wrongs of the whole world.

Intervention by or at the behest of several states is upon the same basis as intervention by one state. The **By several States.** only difference being that the judgment of several as to the necessity is less likely to be wrong than the judgment of one. Some have attempted to show that the two are essentially different, but their reasoning is not conclusive.

Some of the more notable instances of intervention are: the unwarranted interventions of the powers in the affairs of Poland; of Austria in Italy; of France in Spain; of **Instances of Intervention.** Russia in Hungary; of Russia, Germany and France in the affairs of Japan. Of those whose justifiability may be considered doubtful we may mention: the intervention of England in Egyptian affairs, of the United States in Venezuela (1895), and of Germany in Moroccan affairs, 1905. Among the interventions which seem to be justifiable are: the intervention of the powers to secure the independence of Greece, 1827, of the United States in Mexico, 1865, and in Cuba, 1898, of England to protect Belgium in 1870. To some of these, because of their important consequences, we will call special attention.

The intervention of the French in Spain is of particular

**French in  
Spain.**

importance, because to the United States it seemed to indicate a general plan upon the part of the Holy Alliance; and there is little room for doubt but that it led directly to the adoption of our political policy known as the Monroe Doctrine, which has played and will continue to play so important a part in our own history and in the history of the world. It was a clear case of interference to prevent the establishment of a form of government distasteful to the intervening state and to the states instigating the intervention. To admit that such is a right under international law would be to strike a blow at all healthy, independent national development.

**At close of  
Chino-Japanese  
War.**

The intervention of Russia, Germany and France to prevent Japan from holding the territory ceded to her by China was neither legal nor expedient. The settlement reached by the parties to the treaty of Shimonoseki did not threaten the legitimate rights or interests of any of the intervening states. It may have been a little hard on China, but certainly no harder than the terms exacted by the intervening powers as a reward for their intervention. The natural result of that intervention was the war between Russia and Japan, which cost billions of dollars and hundreds of thousands of lives. And as for China, she is in no better position, territorial or otherwise, than before the intervention. It has not therefore had success to commend it. And of all dismal failures, an unsuccessful intervention is the most dismal.

## CHAPTER X.

### AMICABLE SETTLEMENT OF DISPUTES.

For settling international disputes the means which are of a purely pacific nature are: (1) Diplomatic negotiations; (2) Good offices or mediation of third powers; (3) Arbitration. Concerning the first two of these there is little need of any extended discussion, but the third has by reason of its recent increased importance become entitled to a most careful examination. Under diplomatic negotiations we include not only the ordinary diplomatic correspondence carried on through the departments of foreign affairs with the aid of the ministers of the respective states, but also the attempt to reach a peaceful settlement by a discussion of the differences by commissioners appointed or conferences called for the purpose.

No doubt the most natural way of reaching an agreement concerning matters of difference between nations is by discussion through the regularly constituted channels for diplomatic intercourse. And it is safe to say that the greater number of disputes are settled in this way. Nor is it doubtful but that more would be settled in this way but for the fact that the traditions of diplomacy have unfortunately exalted formalities and duplicity rather than simplicity and frankness. The injunction of Louis XI. to his ambassadors — “if they lie to you; lie still more to them” — has far too often been adopted as the rule of conduct of diplomats. It is gratifying to note that the success achieved by the straightforward methods of American diplomacy has had a strong tendency toward bringing about a change from the old Machiavellian methods.

There are however certain advantages connected with the plan of selecting commissioners from the states to the controversy to meet and discuss thoroughly the differences with a view to reaching the basis for peaceful settlement. The personnel of a commission can be selected with a view to their special qualifications for discussing the particular matter or matters in dispute, and for this reason their judgment would be likely to carry greater weight than would that of the ordinary diplomatic agent. Nor are their discussions so hampered by traditions. One of the best examples of this plan for the pacific settlement of differences is the Joint High Commission which was appointed by England and the United States to meet in Washington and agree if possible upon a peaceful settlement of the points of difference between England and the United States, chief of which were those growing out of what were known as the Alabama Claims. The ability and candor of the commissioners was from the start a guarantee of success and the result of their labors has contributed in no small degree toward promoting the good feeling which now exists between the two countries.

**The Joint High Commission.**

It not infrequently happens that where several states are parties to the controversy, or their interests are directly affected, a conference is called to facilitate negotiations looking to an avoidance of hostilities. In such a conference all parties to the controversy and all whose interests are directly affected by the work of the conference are represented. This plan has the same general advantages as the preceding one. But, unfortunately, in the majority of cases, the calling of such a conference is postponed until after war has been resorted to. A notable exception to this is the conference of Berlin, 1885, for the purpose of settling disputes as to the rules to be applied with reference to spheres of influence in Africa.

**Conferences.**

When any one or all of the above methods have failed,



states may avail themselves of the good offices of a third power for the purpose of assisting them in reaching an agreement. This may come about as a result of an offer Good offices. from the third power or a request from the parties to the controversy. In the latter case there is a stronger moral obligation to follow the course suggested by the third power, but in neither case is there any legal obligation.

By the Congress of Paris, 1856, it was resolved that "the plenipotentiaries do not hesitate to express in the name of their governments, the wish that states, between which a serious disagreement should arise, would, before appealing to arms, have recourse, as far as circumstances admit, to the good offices of friendly powers." This, Woolsey characterizes as a "safe and tame recommendation," which no doubt it is. And yet such a declaration causes some feeling of obligation to rest upon the powers signatory to it to act in accordance with it, and to that extent lessens the chances of war.

In mediation, while there is no legal obligation to abide by the decision of a mediator there is a strong moral obligation to do so, particularly if mediation has been requested. Vattel thus defines the duties of a mediator: "he ought Mediation. not scrupulously to insist on rigid justice. He is a conciliator and not a judge; his business is to procure peace; and he ought to induce him who has right on his side to relax something of his pretensions, if necessary, with a view to so great a blessing." (Law of Nations, Bk. II., ch. XVIII., sec. 328.) The mediator does not guarantee en- Duty of Mediator.forcement of his decision, unless there is a specific engagement to do so. During the Middle Ages it was very common for states to submit their disputes to the Pope for mediation. During recent times mediation has become no less common, but the heads of states have been, to a large degree, substituted for the Pope. Undoubtedly, mediation,

though weak in many ways, has in a great many cases prevented a resort to war.

**Arbitration.**

Before considering international arbitration as it exists to-day, it will be well to examine some of the more important schemes of arbitration which have from time to time been presented.

**Arbitration among the Greeks.**

A system of arbitration was developed very early among the Greeks. It may be asserted upon good authority that as between themselves the Greek states were not to wage war until after an unsuccessful resort to arbitration. The interpretation of treaties was, in particular, considered as a matter for determination by an arbitral tribunal. According to Grote and Schömann, the Athenian symmarchy had, from the beginning, a common tribunal for arbitration at Delos.

**Schemes for universal peace.**

The "great design" of Henry IV. was an elaborate but in many ways visionary scheme tinged strongly with the coloring of contemporary politics. In common with the scheme of St. Pierre, it contemplated a great federal state of which the Christian states would be the constituent members. The power to enforce arbitration would then be the central government of the federal state.

**Bentham's plan.**

About 1789, Jeremy Bentham sketched a plan of arbitration, which unfortunately was not published in time to prevent the Napoleonic Wars. According to this plan the states were to reduce their military establishments and get rid of their colonies, which seemed to be the most prolific causes of war. The next step was the establishment of a congress in which each state would have two representatives. The duty of this Congress would be to adjust disputes and maintain peace. For the purpose of enforcing its decrees he conceded it, a police force, which, however, he did not think would be necessary.

**Field's plan of arbitration.**

In his Outline of an International Code, p. 370, Mr. Field suggests the following plan of arbitration:—

“ Whenever a Joint High Commission, appointed by nations to reconcile their differences, shall fail to agree, or the nations appointing them shall fail to ratify their acts, those nations shall within twelve months after the appointment of the Joint High Commission, give notice of such failure to the other parties to this Code, and there shall then be formed a High Tribunal of Arbitration, in manner following: Each nation receiving the notice shall, within three months thereafter, transmit to the nations in controversy the names of four persons, and from the list of such persons the nations in controversy shall alternately, in the alphabetical order of their own names, as indicated in article 16, reject one after another until the number is reduced to seven, which seven shall constitute the tribunal.

“ The Tribunal thus constituted shall by writing signed by the members, or by a majority of them, appoint a time and place of meeting, and give notice thereof to the parties in controversy; and at such time and place, or at other times and places to which an adjournment may be had, it shall hear the parties, and decide between them, and the decision shall be final and conclusive. If any nation receiving the notice fail to transmit the names of four persons within the time prescribed, the parties in controversy shall name each two in their places; and if either of the parties fails to signify its rejection of a name from the list, within one month after a request from the other to do so, the other may reject for it; and if any of the persons elected to constitute the tribunal shall die, or fail for any cause to serve, the vacancy shall be filled by the nation which originally named the person whose place is to be filled.

“ Every nation, party to this Code, binds itself to unite in forming a Joint High Commission, and a High Tribunal of Arbitration, in the case hereinbefore specified as proper for its action, and to submit to the decision of a High Tri-

bunal of Arbitration, constituted and proceeding in conformity to Article 535.

“If any party hereto shall begin a war in violation of the provisions of this Code for the preservation of peace, the other parties bind themselves to resist the offending nation by force.”

**The Hague  
plan.**

The last and most important plan of arbitration is that agreed upon by the international Conference at The Hague, 1899. The most important part of this plan is a Permanent Court of Arbitration in which part of the judges in any given case shall be selected by the parties to the controversy from the list of names of judges nominated by the signatory powers, unless for some reason such judges should appear to be disqualified. The four judges thus selected choose a fifth. In case of a failure of the judges to select an umpire, provision is made for his selection by disinterested powers. The convention has prescribed rules of procedure, which however may be varied by the preliminary agreement of the parties to the arbitration. The decision of this court is legally binding upon the parties. The decision is reached by a majority vote, but all the judges sign the award. The minority have the right to file a dissenting opinion.

**No compulsory  
system of In-  
ternational  
arbitration.**

Thus far there has never been adopted a compulsory system of international arbitration and it is hardly to be expected that one will be adopted for some years to come. So far as can be seen now, the compelling force will, for a long time, be the force of public opinion. That is to say, international arbitration will for a long time be voluntary.

States wishing to submit their disputes to the decision of an arbitral tribunal now have the choice between a temporary tribunal of their own choosing and the permanent court of The Hague. The constitution of the former is determined entirely by the parties, that of the latter has in a general way been provided for. The advantage of a

permanent court over temporary boards has already been referred to. In either case the scope of the arbitration is determined by the preliminary agreement of the parties.

The procedure before an arbitral tribunal is very simple. Each side through its agent and counsel, presents its evidence, copies of all documents being furnished to the opposing side. This is what is known as the preliminary examination. As soon as the evidence is all in, this phase of the proceeding is at an end and the case is ready for discussion. The time allowed for each phase may be agreed upon by the parties; if not, it is fixed by the tribunal. According to Art. 49 of The Hague Convention, "The Tribunal has the right to issue Rules of Procedure for the case, to decide the forms and periods within which each party must conclude its arguments, and to arrange all the formalities dealing with the evidence." Arbitral procedure.

The deliberations of the tribunal are in private. Decisions are reached by a majority vote and, if a member refuse to vote, such fact is recorded. The grounds upon which the decision is reached are stated in the opinion. How award is made. When the award is ready, the agents and counsel of the parties are duly summoned and the award is made public. From this award, which is legally binding upon the parties, there is no appeal and no right to a rehearing unless such right is reserved in the preliminary agreement to arbitrate, and then only when new facts have been brought to light since the formal closing of the case. There is thus a finality about an arbitral award which few court decisions have.

The validity of an award may be attacked upon any one of the five following grounds: (1) If the decision is reached fraudulently; (2) If the provisions of the preliminary agreement are materially departed from without mutual consent; (3) If the tribunal has exceeded its jurisdiction; (4) If the award requires something to be done contrary to international law; (5) If the terms of the award are equivocal. Validity of award.

An interesting case illustrating the third of these is the arbitration of our Northeast boundary line by the King of Holland. The United States claimed one line, the British claimed a line further south. The question as to which was the correct line was submitted to the King of Holland for arbitration and he decided upon a conventional line about midway between them. This the United States very properly insisted he had no authority to do and refused to be bound by the award. The question was settled nine years later in accordance with the Webster-Asburton Treaty.

General arbitration treaties.

Of late there has been a most rapid increase in the number of general arbitration treaties. The United States has negotiated a number, but unfortunately they have not been ratified by the Senate. We have had a number of special arbitration treaties, but as yet no general arbitration treaty. That the latter do increase the chances of settling disputes in a rational way scarcely admits of doubt. For a special arbitration treaty is of course never made until after the dispute has proceeded a considerable distance, so that the blood of both nations is a trifle heated and "bad." Under such circumstances there is not infrequently more of a desire for a fight than for what is considered by many, in such a humor, as a tameway of settling. If, upon the other hand, a general arbitration treaty exists, a nation, though irritated, would rather submit to arbitration than to acquire the reputation of dodging or breaking treaties solemnly entered into.

Progress of arbitration.

All things considered it is safe to say that there is no other field in which international law has made as great advancement within the past few decades and achieved as great practical results as it has in the field of international arbitration. True, there is a great deal yet to be done; and from this many erroneously conclude that nothing has been done. There are still wars and always will be, so long as there is any state which insists upon fighting. For,

just as long as this is the case, force will have to be met by force. But arbitration has undoubtedly prevented some wars, and this achievement is a sufficient justification for the energies which have been expended in advancing it.

#### THE NORTH SEA ARBITRATION.

(Translation from Smith and Sibley.)

The following are the terms of the North Sea Convention, signed at St. Petersburg on November 25th, by his Majesty's ambassador, Sir Charles Hardinge, and Count Lamsdorff: —

“ His Britannic Majesty's Government and the Imperial Russian Government, having agreed to intrust to an International Commission of Inquiry — assembled conformably to Articles 9 to 14 of The Hague Convention of July 29th, 1899, for the pacific settlement of international disputes — the task of elucidating by means of an imperial and conscientious investigation the question of fact connected with the incident which occurred during the night of October 21–22, 1904, in the North Sea, on which occasion the firing of the guns of the Russian fleet caused the loss of a boat and the death of two persons belonging to the British fishing fleet, as well as damages to other boats of the fleet and injuries to the crews of some of those boats, the undersigned, being duly authorized, therefore have agreed upon the following provisions: —

“ Article I. The International Commission of Inquiry shall be composed of five members — Commissioners — of whom two shall be officers of high rank in the British and Imperial Russian navies respectively. The Government of France and of the United States shall each be requested to select one of their naval officers of high rank as a member of the Commission. The fifth member shall be chosen by agreement between the four members above mentioned.

In the event of no agreement being arrived at between the four Commissioners as to the selection of the fifth member of the Commission, his Imperial and Royal Majesty the Emperor of Austria, King of Hungary, will be invited to select him. Each of the two high contracting parties shall likewise appoint a legal assessor to advise the Commissioners, and an agent officially empowered to take part in the labors of the Commission.

“Article II. The Commissioner shall inquire into and report on all the circumstances relative to the North Sea incident, and particularly on the questions as to where the responsibility lies and the degree of blame attaching to the subjects of the two high contracting parties, or to the subjects of other countries in the event of their responsibility being established by the inquiry.

“Article III. The Commission shall settle the details of the procedure which it will follow for the purpose of accomplishing the task with which it has been intrusted.

“Article IV. The two high contracting parties undertake to supply the International Commission of Inquiry to the utmost of their ability with all the means and facilities necessary, in order to enable it to acquaint itself thoroughly with, and appreciate correctly, the matter in dispute.

“Article V. The Commission shall assemble at Paris as soon as possible after the signature of this agreement.

“Article VI. The Commission shall present its report to the two high contracting parties, signed by all the members of the Commission.

“Article VII. The Commission will take all its decisions by a majority of the votes of the five Commissioners.

“Article VIII. The two high contracting parties undertake each to bear on reciprocal terms the expenses of the inquiry made by it previous to the assembly of the Commission. The expenses incurred by the International Commission after the date of its assembly in organizing



its staff, and in conducting the investigations which it will have to make, shall be equally borne by the two Governments."

REPORT OF COMMISSIONERS APPOINTED IN CONFORMITY WITH  
ARTICLE 6 OF THE ST. PETERSBURG DECLARATION OF THE  
12TH (25TH) NOVEMBER, 1904.

1. The Commissioners after minute and prolonged examination of the ensemble of the facts that have come to their knowledge concerning the incidents submitted to them for investigation by the St. Petersburg declaration of the 12th (25th) November, 1904, have in this respect proceeded to give an analytic statement of those facts in their logical order.

In communicating the principal opinions of the Commission on each important or decisive point of this summary exposé, they believe that they have thrown sufficient light upon the causes and the consequences of the incident in question, and at the same time upon the responsibilities resulting therefrom.

2. On the 7th (20th) October, 1904, the second Russian squadron of the Pacific Fleet, under the chief command of Vice-Admiral Aide-de-Camp General Rohzdestvensky, anchored near Cape Skagen with the intention of taking in coal before continuing its voyage to the Far East.

It appears, according to the deposition made, that from the time when the squadron left the roadstead of Reval, Admiral Rohzdestvensky had caused the vessels under his command to adopt minute precautions with the object of placing them fully in a position to repel an attack by torpedo-boats during the night, either at sea or when anchored.

These precautions seemed to be justified by the information frequently sent by the agents of the Imperial Government respecting hostile attempts that were to be

apprehended, and which in all probability would take the form of attacks by torpedo-boats.

Furthermore, during his stay at Skagen, Admiral Rohzdestvensky had been informed of the presence of suspicious vessels off the Norwegian coast. Besides he had learned from the captain of the transport *Bakan*, who had come from the north, that on the night before he had seen four torpedo-boats, which had only a single light at the masthead.

This news caused the Admiral to leave twenty-four hours earlier than he had intended.

3. Consequently each of the six distinct sections of the squadron steamed off separately in turn, and reached the North Sea independently of each other in the order mentioned in Admiral Rohzdestvensky's report; this general officer commanding in person the last section composed of the four new battleships "*Prince Suvaroff*," "*Emperor Alexander III.*," "*Borodino*," "*Orel*" and the transport "*Anadyr*."

This section left Skagen at 10 p. m. on the 7th (20th) October.

The first two sections were ordered to proceed at a speed of twelve knots, and the following section at ten knots.

4. Between 1:30 and 4:15 on the following afternoon, the 8th (21st) October, all the sections of the squadron were passed in succession by the English steamer *Zero*, the captain of which vessel examined the different units closely enough for them to be recognized from his description of them. Moreover, the results of his observations are in general agreement with the indications given in Admiral Rohzdestvensky's report.

5. The last vessel passed by the *Zero* was the *Kamchatka*, according to the description which he (the captain of the *Zero*) gave of her.

This transport, which at first formed part of the same

group as the Dmitri Donskoi and the Aurora, was, therefore, at the time alone and about ten miles behind the squadron, having been obliged to slacken speed owing to a damaged engine.

This accidental delay was perhaps incidentally the cause of the subsequent events.

6. As a matter of fact, towards eight o'clock in the evening this transport met the Swedish vessel *Aldebaran* and other unknown ships, which she fired upon, doubtless owing to the apprehensions aroused in the momentary circumstances by her isolation, the damages to her engines, and her slight fighting value.

However this may be, at 8:45 p. m. the captain of the *Kamchatka* dispatched to his commander-in-chief by wireless telegraphy the statement respecting this meeting that he was "attacked on all sides by torpedo-boats."

7. In order to understand the influence which this news might have had upon the subsequent decisions of Admiral Rohzdestvensky it must be remembered that in his anticipations the attacking torpedo-boats whose presence had thus been announced to him, rightly or wrongly, as being some fifty miles behind the section of the ships under his command, might overtake him towards one o'clock in the morning in order to attack him in his turn.

This information decided Admiral Rohzdestvensky to signal to his ships towards ten o'clock at night to redouble their vigilance and to expect an attack from torpedo-boats.

8. On board the *Suvaroff* the Admiral had deemed it indispensable that one of the two superior officers of his staff should be on duty on the Commander's bridge during the night, in order to superintend in his stead the progress of the squadron and let him know immediately should any incident occur.

Moreover, on board all the ships the permanent orders of the admiral prescribed that the chief officer on duty was

authorized to open fire in case of a manifest and imminent attack of torpedo-boats.

If the attack were made from ahead he was to do so on his own initiative, and in the contrary case, much less pressing, he was to refer to his commanding officer.

With regard to these orders, the majority of the Commissioners considered that they involved nothing excessive in time of war and particularly in the circumstances which Admiral Rohzdestvensky had every reason to consider very alarming in view of the impossibility in which he found himself of verifying the accuracy of the warnings that he had received from the agents of his government.

9. Towards one o'clock in the morning on the 9th (22d) October, 1904, the night was semi-obscure, somewhat overshadowed by a slight and low mist. The moon only showed itself at intervals through the clouds. The wind blew moderately from the south-east, raising a long swell, which made the vessels roll 5 degrees on either side.

The course followed by the squadron towards the south-west necessarily led the last two sections, as was eventually proved, to pass in the neighborhood of the habitual fishing ground of the flotilla of the Hull fishing-boats, consisting of some thirty of these small steamers and covering an area of some miles.

It results from the consistent depositions of the British witnesses that all these boats carried their regulation lights and trawled according to the customary rules under the lead of their "admiral" and pursuant to the indications conveyed by conventional rockets.

10. According to communications received by wireless telegraphy nothing unusual has been signaled by the sections which preceded that of Admiral Rohzdestvensky in traversing these regions.

It subsequently transpired that, notably, Admiral Fölk-

ersam, having been led to skirt the flotilla on the north, very closely examined the nearest trawlers with his electric searchlight, and having thus recognized them as inoffensive, quietly proceeded on his way.

11. It was shortly afterwards that the last section of the fleet, led by the Suvaroff flying Admiral Rozhdestvensky's flag, arrived in its turn near the trawlers' fishing ground. The course taken by this section carried it nearly into the midst of the flotilla of trawlers, which it would have been obliged to skirt, but to the southward, when the attention of the officers of the watch on the bridge of the Suvaroff was attracted by a green rocket, which put them on their guard.

This rocket, fired by the "admiral," indicated in reality, according to their conventions, that the trawlers were to trawl on the starboard side to windward.

Almost immediately after this first alarm, according to the depositions, the observers on the bridge of the Suvaroff, who were scanning the horizon with night-glasses, discovered "on the crest of the waves in the direction of the starboard cathead and at an approximate distance of eighteen or twenty cables," a vessel which appeared to them suspicious, because they saw no light, and the vessel seemed to be coming straight towards them.

When the suspicious vessel was lighted by a searchlight, the men of the watch believed they detected a torpedo-boat going at high speed.

It was for these reasons that Admiral Rhodzestvensky opened fire on the unknown vessel.

The majority of the Commissioners express on this point the opinion that the responsibility for this act and the results of the cannonade sustained by the fishing flotilla rests with Admiral Rozhdestvensky.

12. Almost immediately after opening fire on the starboard side the Suvaroff perceived ahead of it a small boat

barring its course, and was obliged to turn to port in order to avoid colliding with it. But this boat, lighted by a searchlight, was recognized as a trawler.

In order to prevent the firing of the vessels from being directed against this inoffensive boat, the axis of the searchlight was immediately raised 45 degrees.

Thereupon the Admiral signaled to the squadron the order "Not to fire on the trawlers."

But while the searchlight illuminated this fishing-boat, according to the depositions of the witnesses, the observers on the Suvaroff perceived on the port side another vessel which appeared to them suspicious because of its resemblance to that which they were firing on upon the star-board side.

Fire was at once opened, on the second object, and was thus carried on from both sides, the line of ships having by a retrograde movement returned to its original course without having modified its speed.

13. In accordance with the permanent orders of the squadron the Admiral indicated the object on which the fire of the ships was to be directed by fixing the searchlights upon them, but as each ship swept the horizon in every direction around it with its own searchlights in order to guard against a surprise it was difficult to avoid confusion.

This firing, which lasted from ten to twelve minutes, caused serious damage to the trawler's flotilla. It was thus that two men were killed, six others wounded, that the Crane sank, and that the Snipe, the Mino, the Moulmein, the Gull, and the Majestic suffered more or less serious damage.

On the other hand, the Cruiser Aurora was hit by several projectiles.

The majority of the Commissioners declare that they lack precise elements to identify on what object the ship fired, but the Commissioners unanimously recognized that the

boats of the flotilla committed no hostile act, and the majority of the Commissioners, being of opinion that there was no torpedo-boat either among the trawlers or on the spot, the fire opened by Admiral Rohzdestvensky was not justifiable.

The Russian Commissioner, not believing himself warranted in concurring in this opinion, stated his conviction that it is precisely the suspicious vessels that approached the Russian squadron for a hostile purpose that provoked the firing.

14. Respecting the real objects of the nocturnal firing, the fact that the *Aurora* was hit by a few projectiles of 47 millimetres and 75 millimetres would seem to be of a nature to give rise to the supposition that this cruiser, and perhaps even other Russian vessels, delayed on the track of the *Suvaroff* without the vessel being aware of it, may have provoked and attracted the first firing.

This error may have been caused by the fact that this ship, seen from behind, showed no visible light, and owing to a nocturnal optical illusion experienced by the observers on the flagship.

In this connection the Commissioners declared that they lack important information enabling them to ascertain the reasons which brought about the continuation of the firing on the port side. In presence of this conjecture certain distant trawlers might have been confounded with the original objects, and thus cannonaded direct. Others, on the contrary, may have been hit by a fire directed on objects further off.

These considerations, moreover, are not in contradiction with the impression of certain trawlers who, finding themselves hit by projectiles and remaining lit up in the radius of the searchlights, might have believed themselves to be the object of direct aim.

15. The duration of the firing on the starboard side,

even from the standpoint of the Russian version, seemed to the majority of the Commissioners to have been longer than appeared necessary.

But this majority considered that it is not sufficiently informed, as has just been said, with regard to the continuation of the firing on the port side.

In any case, the Commissioners willingly acknowledged unanimously that Admiral Rohzdestvensky personally did all he could from beginning to end to prevent the trawlers, recognized as such, from being the objects of the fire of the squadron.

16. However that may be, the Dmitri Donskoi having eventually intimated her number, the Admiral decided to give the "stop fire" signal. The line of his ships then continued its route to the southwest without having stopped.

In this connection the Commissioners are unanimous in recognizing that, after the circumstances which preceded the incident and those which gave rise thereto, there was at the closing of the firing sufficient uncertainty as to the danger incurred by the section of the ships to decide the Admiral to proceed on his way.

At the same time the majority of the Commissioners regret that it did not occur to Admiral Rohzdestvensky, while going through the Strait of Dover, to inform the authorities of the neighboring maritime Powers, that, having been led into open fire in the vicinity of a group of trawlers, those boats of unknown nationality required assistance.

17. The Commissioners, in closing this report, declared that their appreciations formulated therein are not in their spirit of a nature to cast any discredit either on the military value or the sentiments of humanity of Admiral Rohzdestvensky and of the personnel of his squadron.



## CHAPTER XI.

### MEANS OF COMPULSION SHORT OF WAR.

We have just been considering the different ways in which international disputes may be settled by measures purely pacific. We now come to the consideration of measures which are not necessarily war, but nevertheless border very closely upon it. Among these are: severance of diplomatic relations, embargo, retorsion, reprisal, and pacific blockade. Different kinds of restraint.

Of these the least like war, though it frequently leads to it, is a severance of diplomatic relations. Such an act is always evidence of strained relations and is not infrequently an effective means of securing redress. It may be merely for the purpose of showing displeasure and thus hastening redress with no thought of following it by a declaration of war, if redress is not granted; or it may be for the purpose of serving notice upon the other state that hostilities may at any time be resorted to. The uncertainty as to whether or not war will result has a strong tendency to hasten a pacific settlement, unless the other state is indifferent or desirous of war. A severance of diplomatic relations with Brazil, in 1827, was sufficient to bring that country to a speedy settlement with the United States. Relations were renewed upon the promise of Brazil that "indemnity should be promptly paid for all injuries inflicted on citizens of the United States, or their property, contrary to the law of nations." The United States and other countries have frequently been compelled to threaten to sever diplomatic relations with Turkey, if reparation were not made. Merely the threat has usually been sufficient, particularly if warships were hovering near. In 1834, this form of constraint, minus the warships, was used by the United Severance of diplomatic relations.

States against France and was successful in bringing about the settlement of the spoliation claims, and in 1858 it was equally successful against Mexico. This form of constraint is so comparatively mild and hence so often resorted to that it would be useless to attempt a list of the cases in which it has been used, whether successfully or unsuccessfully.

**Embargo, kinds of.**

A much more drastic remedy, yet one which falls short of actual war, is an embargo. This may be a sequestration of the vessels of the state against which the embargo is directed, which are found in our ports; it may be a prohibition against our own vessels leaving our own ports; or it may be an interdiction of all intercourse with the offending state. If the first form is resorted to, the vessels are simply held as pledges pending settlement. They are not condemned, so that merely the possession and not the title changes, unless war results. The leading case upon this point is *The Boedus Lust*, which will be found at the end of this chapter.

**Embargo on its own vessels.**

Where the second form of embargo is resorted to it is with a view to depriving the other states of articles of commerce which are essential to it. But such an embargo is not at all likely to work satisfactorily, for if the trade thus cut off is not great the other state is not likely to be coerced by cutting it off. And, if it is great, such a choking of it will so derange the trade of the country enforcing the embargo as to bring greater hardship upon it than upon the other country. This was the case in the embargo of 1807.

**Embargo amounting to non-intercourse.**

The third and most drastic form of embargo places the parties to it upon the same footing so far as commercial intercourse is concerned as though a condition of war existed. It also prevents the citizens of one country from going to the other. It might be defined as war, minus the fighting. Such a remedy is very likely to lead to hostili-

ties. This form of embargo was substituted for the second form by the United States in 1809, but directed against Great Britain alone. It was hoped that by thus setting our commerce with other countries free the congestion which had resulted from the other form of embargo would be relieved and that at the same time Great Britain would be starved into her senses. War resulted before the starving process had completed its work. Embargoes have not as a rule been successful, though the one declared by England against the Two Sicilies, in 1839, may be cited as an exception to the rule. This embargo, or rather embargo combined with reprisal, succeeded in breaking up the sulphur monopoly granted by the Two Sicilies to a French company, in derogation of a treaty with England entered into in 1816. The case of the  
Two Sicilies.

Retorsion is a retaliation *in kind* for acts of another state which though strictly within its legal rights, are nevertheless intended as a discrimination against the first state or its citizens. A familiar example of retorsion is what is commonly known as a tariff war. Undoubtedly an independent state has a right to make any kind of tariff laws it pleases, but if it exercises this right in a way which is clearly intended to exclude the goods of another state, that state has an equal right to retaliate by a tariff law equally discriminative against the goods of the first state. The present boycott of American goods by China in return for any exclusion of her citizens is not retorsion, but would be, if, instead of resorting to a boycott of our goods, she were to pass an exclusion law directed against our citizens. The above are examples of negative retorsion or *retorsio juris*. Certain writers claim to have discovered another form, *retorsio facti*, but this is more properly considered as reprisal. Retorsion.

Reprisals consist in the seizure of, or acts of violence toward, the citizens or property of another state by way

**Reprisal, kinds of.**

of set-off or retaliation for unredressed wrongs by it against the retaliating state or its citizens. As when, in 1802, Napoleon imprisoned English travelers in France by way of retaliation for the capture of French vessels by England; or as when in 1780 Holland repudiated its treaty of alliance with England, the latter retaliated by abrogating its treaty of commerce and all other treaties between it and Holland. Mr. Field makes the following classification of reprisals: "a reprisal which consists in the refusal to perform a perfect obligation, or to permit the enjoyment of a right, is termed a negative reprisal. A reprisal which involves the seizure or detention of persons or property in violation of the provisions of this code, or without authority of law, is termed a positive reprisal." (Outlines of an International Code, p. 472, Secs. 712 and 713.) Reprisals have also been divided into *general* and *special*. The latter is where "letters of marque are granted, in time of peace, to particular individuals who have suffered an injury from the government or subjects of another nation." (Wheaton, Part, IV. Sec. 291.) This form of reprisal is now obsolete.

**Pacific blockade.**

We have thus far been considering forms of restraint that are old — almost, if not quite, as old as international law itself. We now come to a measure of restraint short of war — if, indeed, it be short of war — which is comparatively new. This form has been termed "pacific blockade." It is not yet a century old. The first instance of it occurred less than seventy-five years ago, viz., when the Powers blockaded the coasts of Greece in 1827. It seems to have acquired an almost immediate popularity, for in 1831 the Tagus was peacefully blockaded by France; and five years later England resorted to the same remedy against New Granada; but two years later than this, France again resorted to it, this time against Mexico; England had recourse to it against Greece in 1850 and against Rio

de Janeiro in 1862; in 1854, France applied it against Formosa; and two years later the powers again resorted to it against Greece. The most recent case of it is the blockade of the Venezuelan ports by Germany, England, and Italy.

Different nations have given to the term a different scope. For instance, France has claimed the right under it to intercept not only the ships of the state against which the remedy is applied, but the ships of other nations as well. England, upon the other hand, has usually applied it only to the ships of the country whose coast is blockaded. The French rule as to the rights of the pacific blockader seems to us altogether inadmissible. During war, a belligerent may interfere to a certain extent with neutral commerce because of the exigencies of the situation, but during peace there is no excuse for interfering by force with the commerce of a friendly state. Speaking for his government during the French blockade of Formosa, Lord Granville said, "The contention of the French government that a 'pacific blockade' confers on the blockading power the right to capture and condemn the ships of third nations for a breach of such a blockade is in conflict with well-established law." (Lord Granville to M. Waddington, Nov. 11, 1884.) Scope of term.

During the "pacific blockade" of Venezuela, 1902, the allies bombarded one of the Venezuelan ports and sunk one of the Venezuelan ships. The line of demarcation between such a blockade and war is, indeed, a shadowy one. It might not be inaccurate to define a "pacific blockade" as a form of restraint used against a weak power which if used against a strong power would be war. This much is clear, that any form of restraint of which force is the essence may at any moment be considered as an act of war. This brings us to a consideration of war itself. Venezuelan blockade.

**THE BOEDUS LUST.**

(5 Ch. Robinson, 207.)

**EFFECT OF EMBARGO.**

**SIR WILLIAM SCOTT:** This case comes on upon the claims of persons resident in Demarara before the war, and at the time of capture, and I cannot but say that I am glad that the question has been raised, since it may have the effect of putting an end to much uncertainty on the part of persons who, on various grounds, may think themselves entitled to more favorable considerations, than the rules of law prescribe for ordinary cases. The claim is given for several persons as inhabitants of Demarara, not settling there during the time of British possession, nor averring an intention of retiring when that possession ceased. They are therefore to be treated, under this general view, as Dutch subjects, unless it can be shown that there are any other circumstances by which they are protected. It is contended that there are such circumstances, and that they are these: That the property was taken in a state of peace, and that the proprietors are now become British subjects, and consequently that this property could not be considered as the property of an enemy, either at the time of capture or adjudication. Now, with respect to the first of these pleas, it must be admitted, that alone would not protect them, because the court has, without any exception, condemned all other property of Dutchmen taken before the war — And upon what ground? — That the declaration had a retroactive effect, applying to all property previously detained, and rendering it liable to be considered as the property of enemies taken in time of war. This property was seized provisionally, an act itself hostile enough in the mere execution, but equivocal as to the effect, and liable to be varied by subsequent events, and by the conduct of the Government of Holland.

If that conduct had been such as to re-establish the relations of peace, then the seizure, although made with the character of a hostile seizure, would have proved, in the event, a mere embargo, or temporary sequestration. The property would have been restored, as it is usual, at the conclusion of embargoes; a process often resorted to in the practice of nations, for various causes not immediately connected with any expectations of hostility. During the period that this embargo lasted, it is said, that the court might have restored, but I cannot assent to that observation; because, on due notice of embargoes, this court is bound to enforce them. It would be a high misprision in this court, to break them, by redelivery of possession to the foreign owner of that property, which the crown had directed to be seized and detained for farther orders. The court, acting in pursuance of the general orders of the state, and bound by those general orders, would be guilty of no denial of justice, in refusing to decree restitution in such a case, for it has not the power to restore. Its functions are suspended by a binding authority, and if any injustice is done, that is an account to be settled between the states. The court has no responsibility, for it has no ability to act.

This was the state of the first seizure. It was at first equivocal; and if the matter in dispute had terminated in reconciliation, the seizure would have been converted into a mere civil embargo, so terminated. That would have been the retroactive effect of that course of circumstances. On the contrary, if the transactions end in hostility, the retroactive effect is directly the other way. It impresses the direct hostile character upon the original seizure. It is declared to be no embargo; it is no longer an equivocal act, subject to interpretations; there is a declaration of the animus, by which it was done, that it was done *hostili animo*, and is to be considered as a hostile measure *ab*

*initio*. The property taken is liable to be used as the property of persons, trespassers *ab initio*, and guilty of injuries, which they have refused to redeem by any amicable alteration of their measures. This is the necessary course, if no particular compact intervenes for the restitution of such property taken before a formal declaration of hostilities. No such convention is set up on either side, and the state, by directing proceedings against this property for condemnation, has signified a contrary intention. Accordingly, the general mass of Dutch property has been condemned on this retroactive effect; and this property stands upon the same footing as to the seizure, for it was seized at the same time and with the same intent. There is no ground of distinguishing the time of seizure, between these claims and former cases of a similar nature; it was a provisional seizure in all, declared to be hostile by subsequent events, acting in a reflex manner upon all the property then seized, and declaring it to be all enemy's property, unless some circumstances can be shown to take these particular claims out of the common operation.

At the time of the declaration of hostilities, then, this property stood exactly on the common footing; and the result of any proceeding then pronounced, must have been a sentence of condemnation; it lay open to the same legal conclusion at that time, but the settlement has since surrendered to the British arms, and the parties are become British subjects; and this, it is said, takes off the hostile effect, although it might have attached. This argument, to be effective, must be put in one of these two ways, either that the condemnation pronounced upon Dutch property went upon the ground that though seized in time of neutrality, it could not be restored only, because the parties were not now in a condition to receive it; or else, that though seized at a time, that may, to some effect,



be considered as time of war, yet the subjects, having become friends, are entitled to restitution. This latter position cannot be maintained for a moment. It is contradicted by all experience and practice, even in the case of those who had an original British character. In the case of Mr. Whitehill, who had but just set his foot on the colony of an enemy for a few hours, but was proved to have gone there for the purpose of settling, his property was condemned, although, at the time of adjudication, he was again become a British subject, by the surrender of St. Eustatius to the British forces; and where property is taken in a state of hostility, the universal practice has ever been to hold it subject to condemnation, although the claimants may have become friends and subjects prior to the adjudication. The plea of having again become British subjects, therefore, will not relieve them, and the other ground must be resorted to. That is equally untenable in point of fact; for the condemnation of the other Dutch property proceeded on no such ground as the mere incapacity of the proprietors to receive restitution. It proceeded on the other ground, which I have before mentioned, the retroactive effect of the declaration, which rendered their property liable to be treated as the property of enemies at the time of seizure. The reasonings of the court have been founded upon that principle. Property is, indeed, frequently condemned upon the other ground of incapacity to claim, where it is accidentally found in British possession, before the breaking out of hostilities; but where it is seized by an order of state, acting provisionally in contemplation of hostilities, the declaration produces something more than a prospective, future, personal incapacity to claim. It decides upon the character of the property already seized, and on the nature and quality of the seizure. I am of opinion, therefore, that when it is assumed, that the capture is legally to be

considered as made in time of peace, the argument legally fails, because, in all legal views of the matter, it is taken in hostility; it is rendered enemy's property at the time of seizure, by the necessary and general retroaction of the subsequent declaration of hostilities. The whole foundation of the argument, therefore, is defective in the fact. We distinguish, it is true, as between the different interests to which such prize inures, whether it is taken before or after the declaration. That is a matter of subsequent and domestic regulation, but not influencing the general question of prize. If I am right in this opinion, it is quite unnecessary to discuss many questions which have entered into the debate; whether the description of property comes within the periods of the test affidavit or not, will be perfectly immaterial. Nothing is more clear to my apprehension, than that the reference to those periods is not prescribed as the constituent and the distinguishing qualification of property, but merely for the purpose of ascertaining a clearer view of the general facts respecting that property; for instance, as to the first periods, the time of shipment, nobody can suppose that the time of shipment can be there introduced for any other purpose than that of bringing out the whole detail of facts, it being perfectly clear that it is in no degree necessary that it should be enemy's property at the time of shipment, to subject it to condemnation. It is equally immaterial to look to the style of the sentence, for that has accommodated itself according to the discretion of the court, to correspond with the facts. The court is under no necessity of referring to any period of time, in the descriptive language applying to the property or to the parties. If the court is legally satisfied that it is liable to be condemned as enemy's property, there is no occasion to express, in the construction of the sentence, the particular time at which the liability attached.

With as little effect can it be contended, that a postliminium can be attributed to these parties. Here is no return to the original character on which only a *jus postliminii* can be raised. The original character, at the time of seizure and immediately prior to the hostility which has intervened, was Dutch. The present character which the events of war have produced, is that of British subjects; and though the British subject might, under circumstances, acquire the *jus postliminii* upon the resumption of his native character, it never can be considered that the same privilege accrues upon the acquisition of a character totally new and foreign. As to more popular topics to which recourse has been had, I shall leave them to their operation in that quarter, where only they can have a proper effect. It is my duty, in the present case, to apply the principles of a law not very lenient. How far it may be proper to relax the rigor of such an application, will be best considered by those who have more latitude of judgment, as well as a wider sphere of political information and knowledge. It may be fit, in that ultimate and superior consideration, to refer still further back to the former condition of the claimants, as British subjects, during a considerable period of the late war, and down to a time but shortly antecedent to the shipment of these goods. It may be fit to look to the affections and dispositions of the colony; though every surrender of war must be legally considered as the effect of mere force. It may be fit to consider that the property belongs to those, who are now entitled to the character of British subjects. These considerations may have their separate, or their united, influence upon that ultimate judgment to which the law refers the disposal of property captured prior to hostilities. They could only mislead me from the execution of my duty, which is simply to pronounce that the property, at the time of the capture, belonged to subjects of the Batavian Republic, and is as such or otherwise liable to confiscation.

**CASE OF DON PACIFICO.**

(Snow's Cases, 246.)

**REPRISALS FOR INJURY TO ITS SUBJECTS DUE TO LAWLESS ACTS OF CITIZENS OF ANOTHER STATE.**

David Pacifico was a Jew, born at Gibraltar, but in 1847 resident at Athens. By virtue of his birth, he was entitled to the character of a British subject; he had represented himself in that character and had a British passport.

It was customary in Greece for the people to signalize the festival of Easter by burning an effigy of Judas Iscariot; but out of a regard for Mr. Charles de Rothschild, who was at Athens in April, 1847, the police were ordered to prevent this popular ceremony in that year. The mob, attributing this action of the Athenian authorities to the influence of the Jews, was highly incensed against that sect; and proceeded to attack and plunder the house of M. Pacifico, which happened to stand near the place where the effigy was wont to be burned. While his house was being plundered, the family of M. Pacifico received the grossest ill-treatment. M. Pacifico lodged a complaint with the procureur-general of the king, who, on the very day of the riot, held an inquest on the spot, and heard the testimony of the injured parties, but the Greek government took no further action in the matter. M. Pacifico, believing that, by reason of the odium in which his race was held in Greece, he would not be likely to obtain redress through his own efforts, applied to the British minister at Athens, Sir Edmund Lyons. This gentleman called the attention of the Greek government to the facts of the case; but his note was left unanswered for nine months, although he wrote several times subsequently, and when, in January, 1848, he finally received an answer, it was quite unsatisfactory. The government of Greece

suggested that M. Pacifico should collect his damages, through the ordinary courts, from the persons who took part in the riot.

There were other British claims pending against Greece, some of which were of long standing, and as no satisfaction could be obtained from the Greek government, Mr. Wyse, successor to Sir Edmund Lyons, was instructed, in December, 1849, to deliver an ultimatum to that government, and in case it was rejected, Admiral Parker, commanding the English fleet in the Mediterranean, was ordered to lay an embargo upon Greek shipping. The demands of the ultimatum were rejected, and the embargo was immediately enforced, several Greek ships of war and many merchant vessels being seized and detained in the Piræus.

Shortly afterwards, in February, 1850, French mediation was accepted, pending which, active measures were suspended on the part of the English fleet. Mr. Wyse and Baron Gros, the French mediator, came to an agreement upon all points at issue save one; namely, a demand of indemnity by Pacifico for the loss of papers which, he alleged, were evidences of a valid claim by him against the Portuguese government for twenty-one thousand pounds. Mr. Wyse proposed that the Greek government should put into his hands a sum of money as security for the payment of this claim, if, after investigation, it should appear to be well-founded. Baron Gros objected to this, because he not only considered the claim to be worthless, but he contended, further, that this demand was too humiliating for Greece. Failing to agree upon this point, Baron Gros withdrew from the negotiations; thereupon, Mr. Wyse sent a new ultimatum to the Greek government, and this time it was accepted, and the indemnity demanded immediately paid.

The total amount of this indemnity was 6,403*l.* 10*s.*,

with the addition of a deposit of about 5,000*l.* as security for the Portuguese claim. The indemnity awarded included the following items: For personal injury, 500*l.*, for loss of household effects, jewelry, etc., 4,267*l.* 8*s.* As to his Portuguese claim, a commission, having investigated the case, reported in 1851, that it could not be substantiated; but in view of the expense he had incurred, and a small amount due him, he was awarded 150*l.*

Don Pacifico has usually been represented as an adventurer who had little claim upon the sympathy of his fellow-men; and England has generally been severely criticised for supporting his claim. Yet if he was a British subject, he had a right to be protected as such. He was born in British territory, Gibraltar, and his father was born in London. His letters relating to this affair are dignified, and show much ability. His chief crime would seem to have been that of being a Jew. The argument that Pacifico ought to have resorted to the ordinary courts of Greece to obtain his indemnity is quite untenable. What chance of success would he have had in a suit against a mob of several hundred persons, to him unknown, and with public opinion against him? Indeed he brought the matter to the notice of the judiciary department of the government; and it was then the duty of the government to take further proceedings. The fact would seem to be that the whole trouble lay in the weak and vacillating policy of the Greek government, which could easily have avoided all trouble by simply doing justice to M. Pacifico and the other claimants. Whether the British government was justified in resorting to such extreme measures may be questioned; but that some action was called for there can be little doubt.

THE SILESIAN LOAN.

(Snow's Cases, p. 248.)

IS A PUBLIC DEBT HELD BY FOREIGN CREDITORS A PROPER  
SUBJECT FOR REPRISAL?

In 1735 the Emperor, Charles VI., borrowed of several London merchants the sum of 1,000,000 ecus (3,000,000 francs), and as security for payment, gave them a mortgage on the revenues of the Province of Silesia. After the death of the Emperor (1740) Frederick II. of Prussia seized Silesia, which Maria Theresa was constrained to formally cede to him by the treaties of Breslau and Berlin, 1742. Frederick agreed, however, to assume the debt of the province and pay the English creditors.

In 1744 war broke out between England on the one side and France and Spain on the other. And during the next four years the English seized eighteen Prussian vessels and thirty-three other neutral vessels, freighted in whole or in part by Prussian subjects, and laden with merchandise on account of French subjects. These ships and their cargoes were seized for carrying contraband of war or goods belonging to the enemy.

The government of England having refused to listen to the demand of the Prussian government for an indemnity to the claimants, Frederick II. appointed a commission in 1751 to examine these claims and compensate the claimants out of the Silesian loan, the payment of which had been withheld for this purpose. The next year the commission gave judgment, transferring the English mortgage on the Silesian revenues to the Prussian claimants as indemnity for the seizure of their property.

The contention of the Prussian government was that England had acted illegally in capturing the property of her enemies on neutral vessels, — that the rule, supported

by the practice of most of the nations of Europe, was "free ships, free goods;" and further that the treaties of England with the neutral powers, confirmed by the declarations of the English ministry to diplomatic agents of Prussia, had exempted such goods from capture. According to the law of nature, say the Prussian commissioners the vessel of a neutral is his property wherever it may be found (*i. e.*, on the high seas), and a belligerent has no more right to enter it to seize the goods of his enemy, than he has to enter a neutral port and seize the vessels of his enemy therein anchored.

As to contraband of war, the general rule of international law limited it to munitions of war, the only exception being things of *ancipitis usus* destined to a besieged or blockaded port. It was shown that England herself had made several treaties in which provisions and articles of naval construction were expressly excluded from the list of contraband.

Finally, it was asserted, that the English admiralty court had no right of jurisdiction over Prussian vessels or cargoes seized in places not within English territory; and that these unjust confiscations furnished a just cause for reprisals on the part of Prussia.

The matter was referred by the English government to a commission, composed of Sir R. Lee, judge of the Supreme Court, Dr. Paul, the King's Advocate-General in the civil courts, Sir Dudley Ryder, the Attorney-General, and Mr. William Murray, Solicitor-General (celebrated later as Lord Mansfield). The report of this commission is mentioned by Montesquieu as *response sans replique*. The following propositions were laid down:—

(1) When two powers are at war, each has the right to seize as prize of war, the ships and merchandise of the other, but the property of neutrals should not be captured so long as they preserved their neutrality. It follows,



therefore, (2) That the goods of an enemy on board a neutral vessel may be seized. (3) That neutral goods, not contraband, on board the vessel of an enemy, should be released. (4) That contraband goods, although belonging to a neutral, may be seized as prize of war. (5) Before appropriation of captured goods, there must be condemnation by a court of admiralty, judging according to the law of nations and treaties. (6) The only competent court for that purpose is the court of the captor. (7) All proofs, in the first instance, should come from the vessel seized, such as the ship's papers and the depositions of the master and principal officers of the ship. (8) Every vessel must be furnished with the customary papers. (9) If a seizure is made without sufficient grounds, the captor is to be condemned in damages and expenses. (10) Finally, the law of nations permits reprisals in only two cases: First, in the case of a violent wrong directed and supported by the sovereign, or second, of an absolute denial of justice on the part of all the tribunals, and the sovereign himself, in a matter that admits of no doubt.

The report then takes up the cases of the captured vessels in detail, and shows that they were judged with the utmost impartiality. It would seem that all Prussian vessels were restored, and all the cargoes in both classes of vessels save fifteen were likewise restored. The Prussian arguments are then answered seriatim, and shown to be without foundation in law or custom. Perhaps the weakest part of the report is the answer to the Prussian contention that contraband was limited to munitions of war. The question, says Wheaton, was at that time in litigation between England and the states of the north who had an interest in the free exportation of the products of their soil, as naval stores and provisions. The commissioners only said that Prussia could not claim the advantage of modifications of international law which had

been the result of mutual concessions between England and certain neutral states.

As to the Silesian loan, the King of Prussia had pledged his royal word to pay the debt due to private individuals. This debt was negotiable and a large part of it may have been transferred to subjects of other states. It would be difficult to find a case where a sovereign had ever seized by way of reprisal a debt which he owed to private individuals. When individuals lend money to a sovereign, they have to trust to his honor; for a sovereign may not, like other men, be sued, and forced to pay by the interposition of courts of law. England, France, and Spain, it was asserted, had adhered religiously to the principle of the inviolability of the public faith.

The dispute was finally settled by a clause of the treaty of Westminster, January 16, 1756, by which Frederick stipulated to pay the English creditors, and the English government agreed to pay 20,000 pounds sterling to satisfy the Prussian claimant. (Wheaton: *Histoire du Droit des Gens*, I., 260.)

The importance of this case rests, more upon the able exposition of the law of maritime capture by the English commissioners, than upon the question of reprisals. The report of this commission was generally accepted as a correct statement of the law of prize as then existing; and indeed, it so continued with little change till 1856. On the other hand, the Prussian contention was an attempt to establish the principle of "free ships," free goods, which was not realized till a hundred years later.

As to the question of reprisal, England virtually yielded the point in controversy in consenting to indemnify the Prussian claimants. Perhaps political reasons may have influenced the final action. The alliance between France and Austria at this time forced England and Prussia into a counter-alliance, and their minor differences were smoothed over rather hastily.

## PART IV.

### WAR.

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## CHAPTER I.

### WHO ARE BELLIGERENTS.

The right of a community to resort to force rests upon the law of self-preservation, but the right to wage war as the term is understood in international law rests upon a recognition of belligerency by other states, for war is a **Recognition of belligerency.** contest between independent, or quasi-independent, states the essence of which contest is force. An apparent exception to this rule is the case of civil war. But it can hardly be said that insurrection has developed into war until there has been at least a tacit recognition of belligerency, either by the parent state or by other states. Whether recognition is a matter of legal right or a matter of grace has been a question of dispute. But as such a community is not a person in international law it is not a subject of legal rights, its claim to recognition is therefore a moral one, the strength of which depends entirely upon what success it has achieved in the struggle and in internal organization.

A state is not called upon to accord a recognition of belligerency to either faction to a struggle unless such struggle affects its interests. As Calvo says: "The sole **Motive for recognition of belligerency.** motive truly rational and legitimate for a state's according the character of belligerent to the factions of another state, is that the struggle of those factions involves the rights and interests of the foreign government, which by

the recognition of the title of belligerent defines the position that it intends to assume with regard to the combatants." A recognition by a state whose interests were in nowise involved in the struggle would be an interference which could properly be considered an unfriendly act.

**When recognition of belligerency warranted.**

The promptness with which states may be called upon to consider the question of recognizing belligerency depends therefore upon the circumstances of the struggle. If the territory of the community struggling for recognition of belligerency, and eventually the establishment of its independence, is surrounded by the territory of the state against which it is struggling there is no reason why other states should hasten to consider the question of recognizing its belligerency. Under such circumstances they should suspend judgment, unless the failure of the parent state to accord belligerent rights is resulting in acts which shock the moral sense of humanity. Then recognition is warranted as an act of intervention.

**Location as affecting time of recognition.**

If, upon the other hand, the struggling community is upon the border of another state or upon the seacoast, the urgency of a recognition of belligerency is far greater. Under such circumstances the protection of the commercial rights of other states makes it necessary for them to consider the question of recognition—to have the status of the parties to the struggle fixed. For, if the revolted community is not a belligerent, third parties need not respect a blockade of its ports; nor submit to the visit and search of their merchant-vessels, for such right exists only in war; nor to adjudications by prize courts, for such courts have jurisdiction only in case of war. Thus, a war which is at all maritime in its character makes a consideration of the question of recognition entirely warranted, if not imperative, by such states as have commercial relations with that section. No state can be blamed for taking reason-

able means for protecting the interests of its own citizens. In fact it is culpable if it does not.

A recognition of belligerency may be either direct or indirect. When by the parent state it is invariably of the latter character, as by the proclamation of a blockade, the resort to cartels or other acts which impliedly recognize the existence of a state of war. A direct recognition of a state of belligerency is where a state by proclamation or diplomatic correspondence expressly states that in its judgment the community in question is entitled to the rights of belligerents.

As to the justification for a recognition of belligerency, the law is now fairly well settled, the difficulty arises from the room for difference of opinion as to the existence or non-existence of facts. If a state is convinced that the necessary facts exist, it is justified in according recognition. There is general agreement that the following facts must exist: an organized government to whose will obedience is yielded within a given territory, an assertion of its independence, backed by a sufficient fighting force to at least make the struggle of such dimensions and probable permanence as to affect materially the interests of other states.

A recognition of belligerency being therefore an expression of judgment as to questions of fact, it belongs properly to the political branch of the government rather than to the courts. It is generally left to the executive, though in our own government it may be by act of Congress. In the Prize Cases (67 U. S. 635-699) the Supreme Court of the United States expressed the opinion that with reference to recognition of belligerency "this court must be governed by the decisions and acts of the political department of the government to which this power was intrusted."

When recognition of belligerency is not the recognition of

**When recognition becomes intervention.** a fact, but is for the purpose of rendering assistance to the revolted community, it ceases to be the rightful act of a friendly state and becomes an act of intervention, which may be considered a *casus belli*. Yet unless the judgment is palpably without sufficient ground upon which to rest, the motives of an independent state are not to be questioned. The presumption is always that a recognition of belligerency is not intervention, but simply what it purports to be — the recognition of a fact.

**Effect of.** The effect of a recognition of belligerency may be considered (1) From the standpoint of the revolted community; (2) From that of the parent state, and (3) From that of the recognizing state.

**1. Upon belligerent community.** So far as the rights of war are concerned it places the community thus recognized upon an equality with the parent state. It confers upon it the right to demand that the rules of war be conformed to by the parent state during the remainder of the struggle. Its flag is entitled to the respect shown to national flags. It may now send out warships without the fear that their crews will be treated as pirates. These have the right to visit and search the merchant ships of neutrals for contraband goods, and to confiscate them in accordance with the rules of international law, if found. It is also placed under the obligations of conforming to the rules of war, both as towards the parent state and neutrals. These latter may now hold it responsible for any violations of international law resulting in injury to them or their citizens.

**2. As to parent State.** As to the parent state, it relieves it from responsibility to the recognizing state for injuries to its property or citizens by the insurgents; and gives it the right as against such state to visit and search its merchant vessels suspected of carrying contraband of war, and if the circumstances warrant it to take them to a prize court, condemn and confiscate them.

With reference to the recognizing state, it throws upon it all the duties and obligations of a neutral for the remainder of the war. But it may now trade with the belligerents, subject to the rules of contraband and blockade, without being subjected to the risks of dealing with pirates or assisting rebels. There is therefore with reference to all three a balancing of advantages and disadvantages.

Some of the more notable controversies over the question of recognizing belligerency, during the past century, are: — When in 1825 England recognized the belligerency of Greece it was objected by Turkey that to subjects in rebellion no national character could properly belong and hence that the British government was at fault in according to them a belligerent character; but the latter, through its minister, Canning, informed Turkey that “the character of belligerency was not so much a principle as a fact, that a certain degree of force and consistency acquired by any mass of population engaged in war entitled the population to be treated as a belligerent, and even if this title were questionable, rendered it the interest well understood of all civilized nations so to treat them.” (Hansard, 3rd series, c. 1, XII, 1566.)

The recognition by Great Britain and France, of the belligerency of the Southern Confederacy, was resented at the time by the government of the United States as being “unprecedented and precipitate,” but this resentment was due more to a suspicion as to the motives than to a conviction as to the illegality of the act. Inasmuch as a state of war had been tacitly recognized by the United States previously to recognition by Great Britain or France, there was no legal ground of complaint. Yet excitement and interest will at times blur the clearest legal vision.

## CHAPTER II.

### COMMENCEMENT OF WAR.

**Is declaration  
necessary?**

As war changes the normal relation of states, it becomes important to determine when such a change takes place, *i. e.*, when war begins. In considering this question most writers have permitted their minds to be too much influenced by the forms and conceptions of the old fetial law, after the substance of that law had passed away. According to these writers, among whom are to be found the names of Grotius, Puffendorf, Wolf, and Vattel, a declaration of war is necessary to the existence of a lawful war. Before discussing the soundness of their conclusion, it will no doubt tend to clearness to inquire into the purpose of a declaration of war.

**Purposes of  
declaration.**

The purpose is threefold: (1) To apprise the enemy of the determination of the state making the declaration to prosecute its right by force; (2) To apprise its own citizens of the changed relation in which they stand toward the enemy state and its citizens; (3) To apprise neutrals of their changed rights and obligations.

**To apprise  
enemy.**

Up to the time of Grotius the emphasis was thrown entirely upon the first of these. To him must be given the credit for at least partly correcting this error. In book III, chapter 3, he says: "The reason why a declaration is necessary to constitute what is deemed, according to the law of nations, a just war, is not that which some writers assign. For they allege that it is to prevent every appearance of clandestine and treacherous dealing: an openness, which may be dignified by the name of magnanimity, rather than entitled as a matter of right. On this point, we are informed that some nations have gone so far as to settle and make known the very time and place of a general



engagement. But waiving all conjecture, a more satisfactory reason may be found in the necessity that it should be known for *certain*, that a war is not the *private* undertaking of bold *adventurers*, but made and sanctioned by the *public* and *sovereign* authority on both sides; so that it is attended with the effects of binding all the subjects of the respective states; — and it is accompanied also with other consequences and rights, which do not belong to war against pirates and to civil wars.” In this last clause, the purposes which we have mentioned as second and third are at least hinted at.

The need of a declaration in order to apprise the enemy “that a war is not the *private* undertaking of bold *adventurers*” is no longer present; for the presumption of law is that acts of hostility committed in the name of a state by its citizens are the acts of the state, unless promptly disavowed. The circumstances usually leave little room for doubt as to the correctness of the presumption. Such being the case, the uncertainty is more apparent than real, and is at any rate very temporary.

Though other writers have not in terms eliminated the chivalric feature, they have, with the exception of Burlamaqui, in effect done so by admitting that the declaration need not be made until the attacking force is upon the borders or even within the territory of the enemy. According to Vattel, “The declaration, therefore, need not be made until the army has reached the frontiers; it is even lawful to delay it till we have entered the enemy’s territories and there possessed ourselves of an advantageous post; it must, however, necessarily precede the commission of any act of hostility.” (Law of Nations, Bk. III, Ch. 4, Sec. 60.)

With the chivalric feature eliminated, it is hard to see what practical information the declaration gives to the enemy which would not be given by the actual outbreak

**Decreased use  
of declaration  
as to enemy.**

of hostilities. Whatever may once have been the case, nations at present know when they are upon the brink of war. One of the results of the increase of public opinion as a factor in the government of states, or, in other words, the increase of the power of the people, is that rulers cannot plunge their nations into war for family or personal reasons; so that the breaking out of war depends far less than formerly upon whims of rulers or causes unknown to the peoples involved.

**Use of declaration  
as to its  
own citizens.**

In so far as a declaration of war has for its purpose the giving of information to its own citizens, however important it may be, it is outside the scope of a treatise on international law. The duty of a state to its own citizens is a matter of constitutional, not international law.

**Declaration as  
to neutrals.**

So far as international law is concerned, the main purpose of a declaration of war is, therefore, to apprise neutrals of the change in their rights and duties with reference to the belligerents. Incidentally it places before them the causes which the state issuing the declaration conceives to be a sufficient justification for entering upon the war. This is done for the reason that no state is anxious to gain the reputation of going to war for trivial reasons.

Though neutrals are not in as good a position as are the parties to the controversy to judge of the imminence of war, they are not, as a rule, left without official intimation, independently of a declaration. The severance of diplomatic relations is an official warning to the world that a rupture is imminent, and, though it does not necessarily mean war, it puts everyone on their guard that war may at any moment break out.

**Recent tendency.**

The tendency ever since the middle of the seventeenth century has been to dispense with a declaration of war until after hostilities have actually broken out. It, then, as a rule, recites that war exists, not that it will be resorted to. And, most frequently, that it exists by the act of the

other party. In addition to these assertions, which are in large part perfunctory, it usually defines the course which the state issuing it will pursue with reference to contraband of war and other matters which are of interest to neutrals. The fact is that the nearer we come to the present time the rarer are the instances in which formal declarations have preceded the breaking out of hostilities. Since 1700 there have been one hundred and eighteen wars between civilized states, and of these but eleven have been preceded by a formal declaration.

The distinction between the publication of the fact of war by manifesto and by declaration is that the former is **Manifesto.** addressed to the citizens of the state issuing it, and to neutrals, whereas the latter is addressed to the state against which war is declared.

The old idea that a war could not lawfully be begun without a declaration is perpetuated in the terms solemn and unsolemn war. The former was preceded by a declaration and the latter was not. To use the words of Molloy: **Solemn and unsolemn war.** "A general war is either solemnly denounced or not solemnly denounced; the former is when war is solemnly declared or proclaimed by our king against another state. Such was the Dutch War of 1671. An unsolemn war is when two nations slip into a war without any solemnity; as ordinarily happeneth among us. Again, if a foreign prince invades our coasts, or sets upon the king's navy at sea, hereupon a real, though not solemn war may, and hath formerly, arisen. Such was the Spanish invasion in 1598. So that a state of war may be between two kings without any proclamation or indiction thereof, or other matter of record to prove it." (De Jure Maritimo, Bk. 1, Ch. 1.)

As to what are just causes of war there is by no means universal agreement. There have been various classifications, but while all agree in pronouncing the defense of **Just causes of war.** national existence a justification for war, from this point

on there are differences of opinion. Nor is this strange, since the question is a moral one. Legally, each independent state must be allowed to judge as to the causes for which it will enter upon war. While, then, each state is left to judge for itself in the first instance, it is nevertheless under obligations to the rest of the world to remember that war is really a serious matter and should not be entered upon lightly, nor indeed at all until all other means of adjusting its disputes have been exhausted.

Effect of war  
upon inter-  
course.

The effect of war upon treaties has already been considered. But in addition to its effect upon treaties, it puts an end to all diplomatic relations between the states engaged and to all non-hostile relations between their citizens, as well as between their citizens and the enemy state. Hence, contracts between the citizens of the respective belligerents are either suspended or annulled, depending upon the nature of the contract. If the contract is one which could not be interrupted for a period of time and then revive, it is annulled, *e. g.*, a contract of partnership. If upon the other hand it is one for the payment of money or delivery of goods it will not be allowed to operate during the war as that would presumably help the enemy in carrying on hostilities. Its operation is therefore suspended during the war but comes into force with the resumption of peace, yet interest cannot be collected for the period covered by the war.

Seizure of citi-  
zens of enemy.

In theory a belligerent perhaps has, in the absence of treaties to the contrary, the right to seize the citizens of the enemy who may chance to be within his territory at the breaking out of the war, but in practice this right is not now exercised. Between most states the matter is regulated by treaty. Where no treaty exists, the practice is to designate in the proclamation of war a reasonable time during which they may settle up their affairs and leave the country. If instead of availing themselves of this

courtesy for the purpose for which it was extended, they use it rather for the purpose of obtaining information relative to military or naval matters with a view to conveying the same to their own state they may be taken into custody and detained until the end of the war or in extreme cases executed as spies. During the Spanish-American war, President McKinley warned the subjects of Spain who were in the United States that their behavior would be kept under surveillance.

As as to the effect of war upon domiciled aliens there is by no means universal agreement. It would seem clear <sup>Domiciled aliens.</sup> that as the state owes them protection, there is a corresponding obligation resting upon them to render, if need be, military and naval service to it. The United States has repeatedly asserted this principle, and when it was put into operation during the Civil War it led to some controversy with Great Britain. The latter finally admitted that it "might well be content to leave British subjects, voluntarily domiciled in a foreign country, liable to all the obligations ordinarily incident to such foreign domicile, including, when imposed by the municipal law of such country, service in the militia or national guard, or local police for the maintenance of internal peace and order, or even, to a limited extent, for defense of the territory from invasion." The same question had arisen during the war of 1812. At that time the French consul at New Orleans intervened for the purpose of protecting some Frenchmen domiciled in that city from service in the American army. General Jackson settled the controversy by insisting that they serve or leave the city. In so doing he was no doubt acting within his legal rights.

Aliens who are merely sojourners may in rare cases be required to serve in the military establishments of a country. <sup>Sojourners.</sup> It is not unusual to give them a reasonable length of time in which to leave or become residents. Their presence at the

end of the time will be taken as evidence of their intention to remain and they will be subjected to the obligations attaching thereto.

Effect upon allies of enemy.

The effect of the commencement of war upon allies of the enemy is not necessarily to make enemies of them. They always have the right to judge as to whether the terms of the alliance requires that they make common cause with their ally during the war. If they do, they are enemies; if not, neutrals. There is frequently room for difference of opinion as to the obligation of a nation to make common cause with its ally during a war. Certainly it does not need to join its ally in a palpably unjust war. But as to whether or not a war is unjust there is usually room for an honest difference of opinion. Apart from the justice or injustice of the war the treaty may be open to more than one construction, so that the obligation of the ally may be doubtful.

Alliance of U. S. with France.

Thus our treaty of alliance with France gave rise to dispute. The substance of our contention being that the treaty had reference to the interests of the United States and France on this hemisphere, while France contended that it had reference to her European affairs as well. We adhered to our interpretation and remained neutral. The theory put forth by some that the treaty was a personal one with Louis XVI. and hence that the benefit of it could not be claimed by the French Republic was manifestly unsound. A change in the form of government does not affect the obligations or rights under a treaty. That treaty was not in its form or nature a personal agreement but a treaty between two states, and manifestly either one of these states had a right to change its form of government without forfeiting its right under the treaty, unless such change were forbidden in the treaty. No stipulation against a change in form of government was contained in the treaty

**THE PROTECTOR.**

(12 Wallace, 700.)

**WHEN WAR BEGINS AND ENDS.**

Appeal from the Circuit Court of the United States for the District of Louisiana.

This was a motion by Mr. P. Phillips to dismiss an appeal from a decree of the Circuit Court of the United States for the Southern District of Alabama. A motion to dismiss an appeal from the same decree, for the reason that it was not brought within one year from the passage of the act of March 2d, 1867, had been made and denied at the December term, 1869. The appeal was subsequently dismissed on another ground. The ground of this present motion was that more than five years, excluding the time of the rebellion, elapsed after the rendering of the decree, before the appeal was brought.

By the act of 1789, it is provided that writs of error shall not be brought but within five years from the rendering or passing the judgment or decree complained of. By the act of 1803, appeals from decrees were allowed, subject to the same rules, regulations, and restrictions as writs of error. As a writ of error is not brought until it is filed in the court where the judgment was rendered, so an appeal, as this court considers, is not brought until it is filed in the same way.

The decree in this case was rendered on the 5th of April, 1861, and the present appeal was allowed on the 6th of May, 1871, and filed in the clerk's office of the proper court, or brought, on the 17th of May, 1871.

In *Hanger v. Abbott* it was held that the statute of limitations did not run, during the rebellion, against citizens of States adhering to the national government having demands against citizens of the insurgent States. And the question

of course was whether, making allowance for the suspension of time produced by the rebellion, the appeal was or was not in season.

The Chief Justice delivered the opinion of the court.

The question, in the present case, is, when did the rebellion begin and end? In other words, what space of time must be considered as excepted from the operation of the statute of limitations by the war of the rebellion?

Acts of hostilities by the insurgents occurred at periods so various, and of such different degrees of importance, and in parts of the country so remote from each other, both at the commencement and at the close of the late civil war—that it would be difficult, if not impossible, to say on what precise day it began or terminated. It is necessary, therefore, to refer to some public act of the political departments of the government so fix the dates; and, for obvious reasons, those of the executive department, which may be, and, in fact, was, at the commencement of hostilities, obliged to act during the recess of Congress, must be taken.

The proclamation of intended blockade by the President may therefore be assumed as marking the first of these dates, and the proclamation that the war had closed, as marking the second. But the war did not begin or close at the same time in all the States. There were two proclamations of intended blockade; the first of the 19th of April, 1861, embracing the States of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas; the second, of the 27th of April, 1861, embracing the States of Virginia and North Carolina; and there were two proclamations declaring that the war had closed; one issued on the 2d of April, 1866, embracing the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Mississippi, Tennessee, Alabama, Louisiana, and Arkansas, and the other issued on the 20th of August, 1866, embracing the State of Texas.



In the absence of more certain criteria, of equally general application, we must take the dates of these proclamations as ascertaining the commencement and the close of the war in the States mentioned in them. Applying this rule to the case before us, we find that the war began in Alabama on the 19th of April, 1861, and ended on the 2d of April, 1866. More than five years, therefore, had elapsed from the close of the war till the 17th of May, 1871, when this appeal was brought. The motion to dismiss, therefore, must be granted.

## CHAPTER III.

### THE MEANS, INSTRUMENTS AND METHODS OF WAGING WAR.

Distinction between on land and sea.

Having considered the parties to a war and its commencement, we now turn to a consideration of the means, instruments and methods of waging war. And as these are so different on land from what they are on sea, it will tend to clearness to consider them separately; not that the underlying principles differ, but the circumstances are so different as to result in a considerable difference in the application of these principles.

#### SEC. I. THE MEANS, ETC., OF WAGING WAR ON LAND.

Forces of the State.

The primary means or instruments through which a state wages war are men, and on land these are for this purpose combined into armies. Though formerly all men capable of bearing arms were considered as the active forces of the state for the purpose of waging war, these are now divided into combatants and non-combatants. While the whole body of men capable of bearing arms are still included in the potential forces of a state and may be drafted into its service, if needed, they are not considered by the rules of war as a part of its active forces, except in cases to which attention will be called later, until organized as such. This change has come about within comparatively recent times. It followed partly as a result of the advent of the national state, which, in the circumstances under which it developed, rendered standing armies advisable, and partly owing to the growth of the humane idea that those following peaceful professions ought to be in a class apart from those using force, and subjected to different treatment.

In addition to the regular army, the militia, when officered and commissioned by the state so that the state is responsible for their acts, forms a part of the regular forces. **Militia.** In order that soldiers may be distinguished from ordinary citizens, some distinctive uniform is generally considered as requisite. For though, as Bluntschli says, patriotism cannot be made to depend upon the "cut and color of one's clothes," it is but reasonable that, if a distinction is to be made in the treatment of active and passive enemies, there should be some distinctive sign of this difference which is recognizable at a distance.

Levies *en masse* are a lawful part of the active forces of the state. The provisions concerning them contained in **Levies en masse.** the Brussels project have been adopted by The Hague conference and are as follows: "The population of an unoccupied territory, who, on the approach of the enemy, spontaneously take up arms to combat the invading troops, without having had time to organize themselves in conformity with article 9, shall be considered as belligerent if they respect the laws and customs of war."

Partisans are defined by Lieber as "soldiers armed and wearing the uniform of their army, but belonging to a **Partisans.** corps which acts detached from the main body for the purpose of making inroads into the territory, occupied by the enemy." These, though sometimes confused with guerrillas and banditti, are entirely distinct from them and are entitled to be treated as prisoners of war. The proclamation of the allied armies upon their invasion of Valais in 1799 has been justly criticised for its failure to recognize this distinction.

Though the use of mercenaries was rulable during ancient and medieval times, and in fact was common up to the **Mercenaries.** beginning of the last century, it is now discountenanced and if not strictly unlawful is well on the way to become so. At present they must be hired, if at all, as individuals by a

contract with the individual and not as organized bodies by a contract with the state furnishing them. They are now volunteers, but instead of being citizens who volunteer because of patriotic motives, they are foreigners who volunteer either for the pay or for the love of fighting.

It is now contrary to law to employ savages as part of the fighting force in wars against civilized states. This is a change which has come about within the last century. It is in line with the many other changes looking to the making of war as humane as possible. For, even under the best officers, savages will at times revert to barbarities. If evidence were needed upon this point, the history of the employment of savages by Great Britain in her two wars with us and by Russia against the Hungarians furnishes sufficient evidence. As against savages it is not illegal to employ savages, for savages cannot insist upon the application of the rules of international law with reference to them.

**Savages.**

As to exemption of certain classes from military service, to which Vattel gives considerable space in which he criticises especially the exemption of the clergy "who are often so zealous to fan the flame of discord and excite bloody wars," the question is clearly one of constitutional not of international law. Undoubtedly a state has a right to so frame its constitution as to exempt any class from military service, whether or not it shall do so is a question of policy which it must decide for itself and not other states for it.

**Exemption  
from military  
service.**

The weapons or implements which a state may use in its contests with other states is a matter which has undergone great changes, due to invention and the progress of humane ideas. Through this evolution the notable tendency has been to make unlawful the use of those implements which produce an amount of suffering out of proportion to the crippling effect it produces upon the effective force of the enemy. Thus the use of poisoned arrows, of Dum-

**Implements.**

dum or explosive bullets, has been prohibited. The provision with reference to the latter was clearly set forth by the Conference of St. Petersburg, 1868, which forbid the use of projectiles weighing less than 14 ounces charged with either fulminating or inflammable material.

And by the Hague Conference of 1899 it was provided, and the provision was evidently aimed against the Dumdum bullet, that "the contracting parties agree to abstain from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core, or is pierced with incisions." The convention provided further that "the contracting powers agree to abstain from the use of projectiles the object of which is the diffusion of asphyxiating or deleterious gases." From both these provisions the British and American delegates dissented on the ground that they prohibited certain specific things instead of enunciating a general principle. For this reason they favored the adoption of the following provision: "That the use of bullets, inflicting wounds of useless cruelty, such as explosive bullets, and in general every kind of bullets which exceeds the limit necessary for placing a man *hors de combat*, should be forbidden." The objection to this provision, which never came to a vote, is that it is merely declaratory of what was already law. In accordance with this principle the use of nails, scrap iron, copper clippings, etc., as a substitute for shot has been prohibited by the laws and customs of war. The most important conferences upon the question of what weapons may lawfully be used are those from which we have already quoted — The Hague and St. Petersburg.

The same general principle just set forth with reference to the use of weapons applies with reference to methods of waging war. No unreasonable amount of suffering should be caused, and particularly to non-combatants. Thus the

bombardment of towns or villages not used as a shelter for the army of the enemy is contrary to the rules of war. And even in the case of fortified towns bombardment should not be resorted to without first giving at least twenty-four hours notice so as to permit non-combatants to withdraw. It is still permissible to starve a garrison into surrender, though the rules of war require that non-combatants should be permitted to withdraw. This privilege was extended to the non-combatants at Port Arthur when it was decided to reduce the place, if necessary, by starvation. It was, however, refused in the case of the siege of Paris, 1871, but many other acts of harshness were committed during that war which are not sanctioned by the rules of war.

**Sieges.**

In case of sieges, it is usual to spare, in so far as possible, such buildings as museums, schools, churches, hospitals, etc., and for this reason they are designated by a white, yellow, or red-cross flag, or some other mark selected by the besiegers. This rule also was disregarded by the Germans in their sieges of Paris, Strassburg and other French cities during the Franco-Prussian war. Bismarck's justification of this conduct was that "Museums ought not to be placed in fortresses."

**Use of balloons.**

A temporary provision of The Hague Conference was "to prohibit, for a term of five years, the launching of projectiles and explosives from balloons, or by other new methods of a similar nature." This prohibition was placed upon the ground that such methods would be unnecessarily dangerous to non-combatants. To this provision all of the powers gave their assent.

**Devastation.**

The extent to which an invader may resort to devastation, as a means of crushing his enemy by the distress it causes is a difficult matter to determine. Grotius, in his chapter "On Moderation in Despoiling an Enemy's Country, (De Jure Belli ac Pacis, Bk. III, Ch. 12) lays down the rules

that "One of the three following cases is requisite to justify any one in destroying what belongs to another: (1) there must be either such a necessity, as at the original institution of property might be supposed to form an exception, or (2) there must be some debt arising from the non-performance of an engagement, where the waste committed is a satisfaction for that debt, or (3) there must have been some aggressions for which the destruction is only an adequate punishment." In applying these rules he concludes that where detention is sufficient, destruction should not be resorted to and that in no case should works of art or other property of use to neither in carrying on war be destroyed.

We must make a distinction between devastation for the purpose of distressing the enemy and thus forcing an early end of hostilities and devastation prompted by military necessity such as the destruction of bridges to impede advance or cut off retreat or the destruction of buildings in the line of fire. Devastation of territory merely for the sake of lessening the general resources of an enemy is not at present lawful. But devastation dictated by immediate military necessity is lawful.

Two kinds of devastation.

We must make a further distinction between the devastation of one's own territory and of that of an enemy. The former is a question of municipal not of international law. For instance, the destruction of Moscow for the purpose of hampering the military movements of Napoleon was a question for the government of Russia to settle with its own citizens and so long as the settlement was satisfactory to them, other states had no legal ground of complaint. The same is true of the cutting of their dikes by the Dutch.

Devastation of one's own territory.

To what extent deceit may be used in war is not entirely clear. Under Roman Law all manner of deceit and fraud were lawful in war. While this extreme view no longer

Deceit.

holds, there is still a great deal of deceit allowable. All forms of stratagem are still lawful. But just where stratagem leaves off and deceit begins is not always an easy question to answer. The use of spies for securing information is still a lawful form of deceit. But it is not lawful to bribe officers or soldiers of the enemy for the purpose of securing information. The use of the enemy's flag or uniform is not permissible during actual fighting on land.

There is the same obligation to avoid deceit in negotiations during hostilities as during peace. To use the language of Vattel: "Men, although reduced to the necessity of taking up arms for their own defense, and in support of their rights, do not therefore cease to be men. \* \* \* Whenever we have expressly or tacitly engaged to speak the truth, we are indispensably obliged to it by that faith of which we have proved the inviolability." (Law of Nations, Bk. III, Ch. 10.)

#### Assassination.

When deceit takes the form of a plan to assassinate your enemy it is clearly contrary to the laws of war. Such perfidy has no defenders among jurists or generals. No self-respecting nation can point with pride to such an achievement as that of the assassination of William of Orange. While sovereigns and generals are entitled to no exemption from becoming the objects of open force, they are entitled to the benefit of those "laws and usages which have obtained currency among civilized states and which have for their object the mitigation of the miseries of war."

### SECTION II. WARFARE ON SEA.

#### Regular forces on sea.

On sea the regular forces are according to the American Naval Code Art. I.: (1) "The officers and men of the navy, naval reserve, naval militia, and their auxiliaries; (2) The officers and men of all other armed vessels cruising under lawful authority.



Whether a volunteer fleet is a part of the naval force depends upon its organization, how it is officered and the degree of control the state exercises over it. The line of demarcation between some volunteer fleets and privateers is not always a distinct one. Privateering has been expressly abolished by the Conference of Paris, and tacitly by the nations not signatories to that convention, but volunteer fleets are still lawful. While any ship may use force against an enemy and make lawful captures, if it succeeds in overcoming its enemy, it has not the right of visit and capture as against neutrals unless it is lawfully commissioned by its government. If a private ship interferes with neutral ships and attempts to use force against them it may be captured as a pirate. The warships of a *de facto* government are not pirates.

Volunteer fleet.

We have already seen that the public armed vessels of a country are entitled to extraterritorial rights. They are therefore exempt from visit and search, even for the purpose of ascertaining their character. Whether this exemption belongs to privateers is very doubtful though Hautefeuille claims that it does. (Rights and Duties of Neutral Nations, XI, 1.)

Exemptions of public vessels.

A warship must not resort to force while within the territorial waters of a neutral state. So positive is this rule that it is not lawful to deviate from it even when attacked. It has the right to rely for protection upon the state in whose territorial waters it is, but if it resorts to force to protect itself, it forfeits this right, and its state cannot require the neutral government to demand from the enemy the restitution of the ship to it, as it would have been entitled to do had not force been resorted to.

No fighting in territorial waters of a neutral.

The bombardment of unfortified coast towns has for some time been quite generally discountenanced and is now unlawful, as will be seen by reference to Art. 25 of The Hague Convention.

Bombardment of coast cities.

**Torpedoes.**

The use of torpedoes and submarine mines, though exceedingly destructive of life and property, is nevertheless permissible, because the injury to the fighting force of the enemy is commensurate with the suffering caused. For a like reason, red-hot balls, shells and fireships may be used for the purpose of setting fire to the enemy's ships. When submarine mines are used, neutrals should be warned of their location and they should be so securely fastened as to prevent their floating out into the high seas and causing loss of life or property to neutrals.

**Deceit on sea.**

The use of deceit on sea is subject to the same general principles as on land. The use of false colors is allowable, until the first gun is fired. The French flag was used by Lord Nelson as a means of luring the Spanish fleet out of Barcelona, and to this there is no lawful objection.

**Hospital ships and drowning of crews of war-ships.**

Hospital ships must not be fired upon. Nor should the drowning crew of a sunken ship be fired upon, and though there is no legal obligation to rescue them, the most approved usage strongly favors it. It has been done repeatedly by the Japanese during the present war, even at the cost of delay which meant a great deal strategically. The same was done by the navy of the United States during the destruction of the Spanish fleet off Santiago; even cheering was forbidden until the drowning victims were rescued.

**Crews of war-ships to be treated as prisoners of war.**

When a warship of an enemy is captured, the crew, including the religious, medical or hospital staff, are entitled to be treated as prisoners of war. This would not be true of a privateer as between those states that have agreed to abolish privateering. Nor is it ever true of the crew of a piratical ship.

**Capture of private property at sea.**

Though the United States has contended for the adoption of the same rules with regard to the capture of private property on sea as prevails on land, it has not succeeded in getting this rule incorporated into the law of nations. The two rules of the Paris Conference went a considerable way

in this direction, but more remains to be done. Discussion of this matter as of the use which belligerent warships may make of neutral ports will be reserved for later chapters.

Concerning the means, instruments and methods of waging war, the Hague Conference has made the following provisions.

Sect. II. — On Hostilities.

Chapter I. On Means of Injuring the Enemy, Sieges, and Bombardments.

Art. 22. The right of belligerents to adopt means of injuring the enemy is not unlimited.

Art. 23. Besides the prohibitions provided by special conventions, it is especially prohibited: — (a) To employ poison or poisoned arms; (b) To kill or wound treacherously individuals belonging to the hostile nation or army; (c) To kill or wound any enemy who, having laid down arms, or having no longer means of defense, has surrendered at discretion; (d) To declare that no quarter will be given; (e) To employ arms, projectiles, or material of a nature to cause superfluous injury; (f) To make improper use of a flag of truce, the national flag, or military ensigns, and the enemy's uniform, as well as the distinctive badges of the Geneva Convention; (g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war.

Provisions of  
The Hague con-  
vention.

Art. 24. Ruses of war and the employment of methods necessary to obtain information about the enemy and the country are considered allowable.

Art. 25. The attack or bombardment of towns, villages, habitations, or buildings, which are not defended, is prohibited.

Art. 26. The commander of an attacking force, before commencing a bombardment, except in the case of an assault, should do all he can to warn the authorities.

**Art. 27.** In sieges and bombardments all necessary steps should be taken to spare as far as possible edifices devoted to religion, art, science, and charity, hospitals, and places where the sick and wounded are collected, provided they are not used at the same time for military purposes. The besieged should indicate these buildings or places by some particular and visible signs, which should previously be notified to the assailants.

**Art. 28.** The pillage of a town or place, even when taken by assault, is prohibited.

## CHAPTER VI.

### MILITARY OCCUPATION.

The right of the military occupant rests upon force and is justified by military necessity. It is a temporary right which begins and ends with force. It commences when the invading force is in a position to make the will of its commander the dominant will within a given territory. Within certain limits there can be no doubt as to when this condition exists. Certainly as to the territory included within the outpost of an invading army military occupation is an established fact. But it is not confined to these limits. The territory for some distance in the front and to the flank of an invading army is also in his military occupation, unless the enemy is present in force.

**Foundation of  
right of military  
occupant.**

With respect to territory within the constructive but not actual military grasp of the commander there is no definite, well established rule. The rule frequently suggested, and the one adopted by the Germans in their war with France, is that when a commander has actually secured possession of part of an administrative unit, the balance of it is constructively within his possession, and hence, in his military occupation upon posting notice to this effect, unless resistance by the regular organized forces still continues.

**Rule as to con-  
structive occu-  
pation.**

The effect of military occupation is to substitute, during its continuance, the will of the military occupant for that of the lawful sovereign. In other words, it substitutes martial law for the laws of the sovereign. It does not, however, affect the allegiance of the citizens to that sovereign. This conception is nevertheless a relatively recent one. Down to the middle of the eighteenth century, the

**Effect of mili-  
tary occupation.**

Roman doctrine  
of *res nullius*.

doctrine of the Roman Law, that when territory passed out of the hands of its owner, as a result of war, it became *res nullius* so that the military occupant by virtue of taking possession of it made it his own, prevailed. Under this theory, military occupation, for whatever purpose, amounted to conquest, and the ordinary consequences of conquest followed. Thus the military occupant became entitled not only to the obedience but to the allegiance of the inhabitants of the occupied territory. He might require an oath of allegiance of them and might even require them to serve in his army. Frederick II. laid it down as a general principle of war that "if an army takes up winter-quarters in an enemy's country it is the business of the commander to bring it up to full strength; if the local authorities are willing to hand over recruits, so much the better, if not, they are to be taken by force." (Works of Frederick II., XXVIII, 91.)

Modern doctrine.

The modern doctrine differs radically from the above. It proceeds upon the supposition that military occupation and conquest are distinct things; that the former is simply a temporary condition which may or may not ripen into the latter. Until it becomes conquest it does not effect a change in the allegiance of the inhabitants of the occupied territory. The military occupant is entitled to the obedience of those living in the occupied territory, as this is a matter of necessity in order to prevent chaos and anarchy. But the question of a change of allegiance need not be settled at once, it may properly await the final outcome of the war. This change in the legal conception of the nature of military occupation has resulted in limiting the power of the military occupant to such acts as are generally considered necessary from the standpoint of military science. He may not require an oath of allegiance, as that is not necessary; neither may he require the inhabitants to do military service.

He may, however, require them to furnish food, materials, horses, carts, etc., but upon condition that he pay cash for them or give promises of future payment. He is entitled to collect the taxes and duties and as already suggested may levy contributions and requisitions. A distinction, not always recognized, between these is that the former are in the nature of gifts of money and need not be accounted for, while the latter are in kind, and should be paid for in cash, or their receipt should be acknowledged, in order that settlement may be made later and that a future commander may know what has been collected. Contributions were formerly considered as a commutation for the supposed right to plunder. He may take possession of all movable property of the state which may be used for military purposes. Of the real property of the state he has simply a usufructuary right and must not commit waste. He is not to interfere with the religious or social affairs of the community, or to change the laws regulating titles to property. Nor should he restrict the freedom of speech or press, except in so far as it interferes with obedience to his rule.

The rule of the military occupant is known as martial law, which is defined by the Duke of Wellington as follows: "Martial law is neither more nor less than the will of the general who commands the army. In fact martial law means no law at all; therefore the general who declares martial law, and commands that it shall be carried into execution, is bound to lay down distinctly the rules and regulations and limits according to which his will is to be carried out. Now I have in another country carried out martial law; that is to say, I have governed a large portion of a country by my own will. But then what did I do? I declared that the country should be governed according to its own national law, and I carried into execution my so declared will." (Hansard, 3rd series, C. XX,

881.) No better guide than this could be laid down for the military commander. His duty within the occupied territory is that of an executive for the purpose of enforcing order rather than of legislating for the people. If any changes in the laws are made they should be such, and such only, as are dictated by military necessity. He may enact reasonable measures for assuring his own security, but should in this avoid harshness and cruelty. In this respect means were resorted to by the Germans while in military occupation of parts of France which have never met with general sanction, *e. g.* the placing of French citizens upon the engines of German trains so that, if the trains were wrecked, these hostages would be the first to suffer. While hostages may be held as a guarantee of order, they must be treated as prisoners of war and not subjected to punishment or dangers.

**Military occupation as affecting neutral States.**

As regards third states, the territory in military occupation is considered as territory of the military occupant. To use the language of Chief Justice Marshall: "although acquisitions made during war are not considered as permanent until confirmed by treaty, yet to every commercial and belligerent purpose they are considered as a part of the domain of the conqueror, so long as he retains the possession and government of them." (*Thirty Hogsheads of Sugar v. Boyle et al.*, 9 Cranch, 195.) This could not well be otherwise. For unless neutrals are to be kept away entirely they must deal with the power in control whoever they may be.

**Termination of military occupation.**

Military occupation would seem logically to cease whenever the force upon which it rests ceases. But so firmly rooted was the old doctrine that military occupation effected a change of allegiance that some of the results of that doctrine still cling. There are those who claim that territory once in military occupation continues so until the occupant is driven out and the former owner re-establishes his possession throughout the territory.



It would of course make no difference whether the military occupant is dispossessed by the ousted state or its ally, but there is no difference of opinion where the military occupant is ousted by a third state not in alliance with the occupied state. This latter is illustrated by the capture of Genoa by Sir Wm. Bentinck at the head of British forces. After the capitulation an independent republic was set up by the inhabitants at the suggestion of Bentinck. It was, however, given to Sardinia the next year (1815), by the Congress of Vienna. Sir James McIntosh and others argued that when the British drove the French out of possession this inured to the benefit of the Genoese whether England was their ally or not. That as England had never recognized the occupation by the French as a conquest and extinction of the Genoese state, that state still existed and as it was friendly with England the latter had no right of conquest against it but had against France, the military occupant, with whom she was at war, and that hence with the dispossession of France the rights of Genoa revived. This would seem to be the more sound view, yet the opposite view was taken by the British government, partly on the ground that the state of Genoa had passed out of existence. In other words, the dispute resolved itself, partly at least, into a question of fact as to whether the possession by the French was military occupation or conquest. (Hansard, Vol. XXX., 387 and 891.)

When military occupation ended by act of neutral state.

When military occupation ends, the rule of the former owner revives by the right of postliminium. According to this fiction, which is a development from the *jus postliminii* of the Roman Law, as soon as military occupation ends, the right of the original state is looked upon as having been continuous. With the establishment of the new doctrine as to the nature of military occupation, this fiction is superfluous in order to revive the rights of the original

Right of postliminium.

state. For, since its rights have only been temporarily interrupted by force, they revive as a matter of course whenever that force ceases to operate.

Extent of the  
right.

The right of postliminium does not entitle the original state to disturb the conditions resulting from acts of the military occupant within his legal power, *e. g.* sentences upon criminals convicted according to law, transfers, etc. But if the military occupant performs acts in excess of his legal rights, such acts in derogation of the rights of others and resting merely upon force are nullified by the disappearance of that force. Even under the old doctrine, the original state did not need to respect the acts of the military occupant in excess of his legal right, *e. g.* transfers of its real property by the military occupant, who is entitled merely to the usufruct of such property until military occupation ripened into conquest.

Franco-Prussian  
Timber  
case.

A rather recent case involving the question of the extent of the military occupant's rights is the timber controversy which arose immediately after the Franco-Prussian war. The German government had let a contract to private parties for the timber upon certain of the state lands of France, which were, at the time the contract was let, in the military occupation of the Germans. The contract price was paid in advance. Upon the conclusion of peace, the French government enjoined the contractors from proceeding any further, on the ground that the part of the contract not completed during the period of military occupation was *ipso facto* nullified by the resumption of French control. This contention was in accord with international law, and its soundness was finally admitted by the German government.

Military occu-  
pation of prop-  
erty captured at  
sea.

Property captured at sea is held by right of military occupation, and if recaptured before the title has been transferred by the decision of a prize court the right of the military occupant is ended. The recaptors are, how-

ever, entitled to salvage which differs with differing circumstances and in different countries. In the United States and England one-eighth is the usual rate of salvage. France allows but one thirtieth, if the recapture takes place within twenty-four hours, but one-tenth if later than that. Several countries do not recognize the right of recapture as ended by the decision of a prize court, but the United States does.

Upon the question of military occupation the Convention at The Hague provides as follows: —

Sect. III. On Military Authority over Hostile Territory.

Art. 42. Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation applies only to the territory where such authority is established, and in a position to assert itself. Provisions of Hague Conference as to military occupation.

Art. 43. The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

Art. 44. Any compulsion of the population of occupied territory to take part in military operations against its own country is prohibited.

Art. 45. Any pressure on the population of occupied territory to take the oath to the hostile power is prohibited.

Art. 46. Family honors and rights, individual lives and private property, as well as religious convictions, and liberty, must be respected. Private property cannot be confiscated.

Art. 47. Pillage is formally prohibited.

Art. 48. If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the state, he shall do it as far as possible in accordance with the rules in existence and the assessment in force, and will in consequence be bound to defray the expenses of the administration of the occupied territory on the same

scale as that by which the legitimate government was bound.

Art. 49. If, besides the taxes mentioned in the preceding article, the occupant levies other money taxes in the occupied territory, this can only be for military necessities, or the administration of such territory.

Art. 50. No general penalty, pecuniary or otherwise, can be inflicted on the population on account of the acts of individuals, for which it cannot be regarded as collectively responsible.

Art. 51. No tax shall be collected except under a written order and on the responsibility of a commander-in-chief. This collection shall only take place, as far as possible, in accordance with the rules in existence and the assessment of taxes in force. For every payment a receipt shall be given to the taxpayer.

Art. 52. Neither requisitions in kind nor services can be demanded from communes or inhabitants for the necessities of the army of occupation. They must be in proportion to the resources of the country, and of such a nature as not to involve the population in the obligation of taking part in military operations against their country. These requisitions and services shall only be demanded on the authority of the commander in the locality occupied. The contributions in kind shall, as far as possible, be paid for in ready money; if not, their receipt shall be acknowledged.

Art. 53. An army of occupation can only take possession of the cash, funds, and bills payable on demand belonging strictly to the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property of the State which may be used for military operations. Railway plant, land telegraphs, telephones, steamers, and other ships, apart from cases governed by maritime law, as well as depots of arms, and, generally, all kinds of war

material, even though belonging to companies or to private persons, are likewise material which may serve for military operations, but they must be restored at the conclusion of peace, and indemnities paid for them.

Art. 54. The plant of railways coming from neutral States, whether the property of those States, or of companies, or of private persons, shall be sent back to them as soon as possible.

Art. 55. The occupying State shall only be regarded as administrator and usufructuary of the public buildings, real property, forests, and agricultural works belonging to the hostile State, and situated in the hostile country. It must protect the capital of these properties, and administer it according to the rules of usufruct.

Art. 56. The property of the communes, that of religious, charitable and educational institutions, and those of arts and science, even when State property, shall be treated as private property. All seizure of, and destruction, or intentional damage done to such institutions, to historical monuments, works of art or science, is prohibited, and should be made the subject of proceedings.

## CHAPTER V.

### RIGHT OF BELLIGERENT OVER PERSON OF ENEMY.

Right to kill.

Undoubtedly a belligerent has the right to kill his enemy; but this right, though once held to apply generally and indiscriminately to all persons of the enemy, has now become subject to well recognized limitations. To the international law of the present time, all persons of the enemy do not look alike. There has come to be a well-understood division of the persons of the enemy into combatants and non-combatants. As the right of the belligerent over the one is a very different thing to his right over the other, we will consider them separately.

#### SEC. I. RIGHTS OVER PERSON OF COMBATANTS.

Who are combatants?

Under the term combatants are included the officers and men of the army and navy, as to this there can be no room for question. But the term is generally extended so as to include the chief and chief officers of the hostile government, diplomatic agents; officers and employes of the supply and transport service, since these are necessary to the mobility of the army; also "all agents, contractors, and others who accompany an army in an official capacity, and who assist in its movement, equipment or maintenance," and all camp retainers. Levies en masse and militia are as much combatants as are members of the regular army, provided that in the case of militia they conform to the following conditions: (1) "To be commanded by one person responsible for his subordinates; (2) to have a distinctive

emblem recognizable at a distance; (3) to carry arms openly; and (4) to conduct their operations in accordance with the laws and customs of war." (Chap. 1, Art. 1 of the convention of the Conference at the Hague, 1899.)

It is scarcely necessary to say that while a combatant of the enemy is using force against a belligerent he has the right to overcome this force, and, if killing his enemy is necessary in order to overcome him, then he has the right to kill him. But as soon as he ceases to be able to use force, the right to kill ceases. No one now questions this. Yet such has not always been the rule. According to the rules of ancient war the captured combatant might lawfully be killed. It is from this harsh doctrine that the right to enslave was drawn. For, if the captor had a right to kill his prisoner, he could exercise any lesser right over him, i. e., he could sell him or hold him as a slave.

It is only during comparatively modern times that the right to kill, after resistance has been overcome, has been definitely abandoned by all civilized states. During the religious wars of the sixteenth and seventeenth centuries, quarter was frequently refused. This was particularly true of the wars with the Dutch. For some time after the general duty of giving quarter was recognized it was held that if a garrison of an insufficiently fortified place held out, so as to make an assault necessary, such garrison was not entitled to quarter. In arguing against this survival of barbarism, Vattel says: "If it be urged, that, by threatening a commandant with death, you may shorten a bloody siege, spare your troops, and make a valuable saving of time, my answer is, that a brave man will despise your menace, or, incensed by such ignominious treatment, will sell his life

When right to kill ceases.

Ancient practice.

as dearly as he can, will bury himself under the ruins of his fort, and make you pay for your injustice. The menace of an unjust punishment is unjust in itself; it is an insult and an injury." (Bk. III, Ch. 8.)

**Reprisals.**

The making of reprisals for violations of the rules of war by your enemy is a very different thing from the refusing of quarter in general. If the inviolability of ambassadors, the protection due to persons under a flag of truce, or Red Cross flag, are disregarded, there is an undoubted right to inflict punishment upon your enemy for such violation, and this punishment may lawfully extend to the taking of the life of the offender. But even here the punishment should bear a reasonable relation to the offense and must not as formerly be dealt out indiscriminately upon guilty and innocent.

**Prisoners of war and their treatment.**

When combatants surrender or are captured, whether on land or sea, they have an undoubted right to be treated as prisoners of war, unless by their acts they have forfeited such right. As to the treatment to which a prisoner of war is entitled there has been gratifying improvement, particularly within the last half century. This has been brought about partly by treaty, but more by conferences, especially the conferences at Brussels and Geneva. But the most elaborate and advanced regulations upon this point are the following from chapter II of the convention signed by the representatives of the nations assembled at The Hague, 1899.

**Provisions of the Hague Convention concerning prisoners of war.**

Art 4. Prisoners of war are in the power of the hostile government, but not in that of the individuals or corps who captured them. They must be humanely treated. All their personal belongings, except arms, horses, and military papers, remain their property.

Art. 5. Prisoners of war may be interned in a town, fortress, camp, or any other locality, and bound not to



go beyond certain fixed limits; but they can only be confined as an indispensable measure of safety.

Art. 6. The State may utilize the labor of prisoners of war according to their rank and aptitudes. Their tasks shall not be excessive, and shall have nothing to do with the military operations. Prisoners may be required to work for the public service, for private persons, or on their own account. Work done for the state shall be paid for according to the tariffs, in force for soldiers of the national army employed on similar tasks. When the work is for other branches of the public service or for private persons, the conditions shall be settled in agreement with the military authorities. The wages of the prisoners shall go towards improving their position, and the balance shall be paid them at the time of their release, after deducting the cost of their maintenance.

Art. 7. The government into whose hands prisoners of war have fallen is bound to maintain them. Failing a special agreement between the belligerents, prisoners of war shall be treated as regards food, quarters, and clothing, on the same footing as the troops of the government which has captured them.

Art. 8. Prisoners of war shall be subject to the laws, regulations, and orders in force in the army of the state into whose hands they have fallen. Any act of insubordination warrants the adoption, as regards them, of such measures of severity as may be necessary. Escaped prisoners, recaptured before they have succeeded in rejoining their army, or before quitting the territory occupied by the army that captured them, are liable to disciplinary punishment. Prisoners who, after succeeding in escaping, are again taken prisoners, are not liable to any punishment for the previous flight.

Art. 9. Every prisoner of war, if questioned, is bound to declare his true name and rank, and if he disregard this rule he is liable to a curtailment of the advantages accorded to the prisoners of war of his class.

Art. 10. Prisoners of war may be set at liberty on parole if the laws of their country authorize, and, in such a case, they are bound, on their personal honour, scrupulously to fulfill, both as regards their own government and the government by whom they were made prisoners, the engagements they have contracted. In such cases, their own government shall not require of nor accept from them any service incompatible with the parole given.

Art. 11. A prisoner of war cannot be forced to accept his liberty on parole; similarly the hostile government is not obliged to assent to the prisoner's request to be set at liberty on parole.

Art. 12. Any prisoner of war, who is liberated on parole and recaptured bearing arms against the government to whom he had pledged his honour, or against the allies of that government, forfeits his right to be treated as a prisoner of war, and can be brought before the Courts.

Art. 13. Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers, contractors, who fall into the enemy's hands, and whom the latter think fit to detain, have a right to be treated as prisoners of war, provided they can produce a certificate from the military authorities of the army they were accompanying.

Art. 14. A Bureau for information relative to prisoners of war is instituted, on the commencement of hostilities, in each of the belligerent states, and, when necessary, in the neutral countries on whose territory bellig-

erents have been received. This Bureau is intended to answer all inquiries about prisoners of war, and is furnished by the various services concerned with all the necessary information to enable it to keep an individual return for each prisoner of war. It is kept informed of internments and changes, as well as of admissions into hospitals and deaths. It is also the duty of the Information Bureau to receive and collect all objects of personal use, valuables, letters, etc., found on the battlefields or left by prisoners who have died in hospital or ambulance, and to transmit them to those interested.

Art. 15. Relief societies for prisoners of war, which are regularly constituted in accordance with the law of the country with the object of serving as the intermediary for charity, shall receive from the belligerents for themselves and their duly accredited agents every facility, within the bounds of military requirements and administrative regulations, for the effective accomplishment of their humane task. Delegates of these societies may be admitted to the places of internment for the distribution of relief, as also to the halting places of repatriated prisoners, if furnished with a personal permit by the military authorities, and on giving an engagement in writing to comply with all their regulations for order and police.

Art. 16. The Information Bureau shall have the privilege of free postage. Letters, money orders and valuables, as well as postal parcels destined for the prisoners of war, or despatched by them, shall be free of all postal duties, both in the countries of origin and destination, as well as in those they pass through. Gifts and relief in kind for prisoners of war shall be admitted free of all duties of entry and others, as well as of payments for carriage by the government railways.

Art. 17. Officers taken prisoners may receive, if necessary, the full pay allowed them in this position by their country's regulations, the amount to be repaid by their government.

Art. 18. Prisoners of war shall enjoy every latitude in the exercise of their religion, including attendance at their own church services, provided only they comply with the regulations for order and police issued by the military authorities.

Art. 19. The wills of prisoners of war are received or drawn up on the same conditions as for soldiers of the national army. The same rules shall be observed regarding death certificates, as well as for the burial of prisoners of war, due regard being paid to their grade and rank.

Art. 20. After the conclusion of peace the repatriation of prisoners of war shall take place as speedily as possible.

Spies always have been and probably always will be used by commanders of armies. The essential characteristic of a spy is disguise and secrecy. It is not contrary to the rules of war to use them and yet when caught they are shot or hanged, usually without much formality. In common with blockade runners, their liability to punishment ends with the end of their expedition. A person cannot be legally drafted to perform duty as a spy, he must always be a volunteer. Though used by each army, they are considered so dangerous when used by the other that it is necessary to resort to drastic methods in order to stamp out the practice. The Hague convention makes the following provisions concerning spies:

Art. 29. An individual can only be considered a spy, if, acting clandestinely or on false pretenses, he obtains,

or seeks to obtain, information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party. Thus, soldiers not in disguise who have penetrated into the zone of operations of a hostile army to obtain information are not considered spies. Similarly the following are not considered spies; soldiers or civilians, carrying out their mission openly, charged with the delivery of despatches destined either for their own army or for that of the enemy. To this class belong likewise individuals sent in balloons to deliver despatches, and generally to maintain communication between the various parts of an army or a territory.

Provisions of the  
Hague Convention  
concerning  
spies.

Art. 30. A spy taken in the act cannot be punished without previous trial.

Art. 31. A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage.

Deserters from an army are not entitled to the rights of prisoners of war when captured in the ranks of the enemy. They are put to death. No status they may have gained by reason of enlistment with the opposing army can give them any protection.

Deserters.

Lieber's Code makes the following provision concerning guerillas: "Men or squads of men who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and vocations, or with the occasional assumption of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men, or squads of men,

Guerillas.

are public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates."

**Who are combatants at sea?**

At sea, the officers and crews of all armed vessels or of unarmed vessels in the service of the enemy as auxiliaries are combatants and, when captured, are entitled to treatment as prisoners of war, unless by acts of piracy or other violations of the rules of war they have forfeited their right. But if, after the destruction of their ship they reach a place of safety without coming under control of the belligerent they cannot be claimed as prisoners of war. A celebrated case of this sort is that of Captain Semmes who, after the destruction of the *Alabama*, escaped to a British pleasure yacht, *The Deerhound*. A neutral has a right to rescue the crews of sinking ships of the belligerents, and, unless ample means are provided by the belligerent, humanity demands this. But such persons, if combatants, are to be interned for the balance of the war. A very recent example of this is the rescue of parts of the crews of the *Variag* and *Korietz*, by the ships of neutrals, when the Russian warships were sunk by the Japanese in Chemulpo harbor.

**Treatment of sick and wounded.**

Whenever the enemy has lost the power of resistance, whether he be on land or sea, he is no longer the object of attack but becomes the object of such assistance as can be reasonably rendered. The purpose of war is to overcome resistance, and when resistance ceases the excuse for the use of force ceases. The treatment of the sick and wounded of the enemy who fall into the power of a belligerent is regulated by the Geneva convention of 1864, which together with the improvements that

have been made upon it was adopted by the convention at The Hague.

## SEC. II. NON-COMBATANTS.

Whatever may be the theory, the practice is now to regard war as a contest between states, a contest to be waged by the organized forces of the contending states, and the individual citizens of these states who are not connected with the organized forces are non-combatants —are passive enemies only. While it was at one time permissible to kill, or reduce to slavery, these also, such would now be entirely contrary to the rules of war. They must, however, not interfere with the military operations of the belligerent. Should they do so by getting between his forces and the enemy, the belligerent may kill them without violating the rules of war. But to direct operations against them, as by bombardment of a city in order to bring pressure upon the commandant of a fortress to surrender, is impermissible. For the past century there has been a decided tendency to make war interfere to as small an extent as possible with the safety of non-combatants. The United States has always lent the strength of its example toward the furtherance of this tendency. This was particularly noticeable in the instructions given to and the conduct of our forces during our war with Mexico. The behavior of the Japanese forces during the recent war is equally commendable. Such progress has been made that it is abundantly safe to conclude that the old rule will never be resorted to in future wars between civilized people. And even in wars with savages we may expect that the new rule will be applied in so far as military necessity will permit. At any rate we need not look for the old rule to

be applied in all its severity. The strictness with which the new rule will be conformed to by the individual soldiers of any army will of course depend upon the degree of discipline maintained by its officers. Undoubtedly it will be departed from at times.

**Rights of non-combatants.**

Not only are non-combatants not to be injured except in so far as military necessity makes injury to them unavoidable, but they are not to be made prisoners of war or be otherwise interfered with in their peaceful pursuits. The part taken by the United States in bringing about the establishment of this rule is one in which we may justly take a pardonable pride. From the very beginning of her national existence her influence has been exerted in this direction.

**Treaty of 1785 between U. S. and Prussia.**

In the treaty of 1785, between the United States and Prussia, article 23, (which was proposed by the American Commissioners, John Adams, Benjamin Franklin and Thomas Jefferson, and is said to have been drawn up by Franklin) provided that, if war should arise between the contracting parties, "all women and children, scholars of every faculty, cultivators of the earth, artisans, manufacturers and fishermen, unarmed and inhabiting unfortified towns, villages or places, and in general all others whose occupations are for the common subsistence and benefit of mankind, shall be allowed to continue their respective employments, and shall not be molested in their persons; nor shall their houses or goods be burnt or otherwise destroyed, nor their fields wasted, by the armed force of the enemy, into whose power, by the events of the war, they may happen to fall; but if anything is necessary to be taken from them for the use of such armed force, the same shall be paid for at a reasonable price."



## CHAPTER VI.

### RIGHT OF BELLIGERENT OVER PROPERTY OF ENEMY.

The rights of belligerents over the property of enemies has with reference to some things undergone a revolution, as to others a substantial modification, and with respect to practically none has it remained unchanged. The extent of the power of the belligerent and the degree to which it has been modified depends upon the character of the property, its form, its ownership, and its location.

Change in law on this subject.

As to character, property is for our present purposes divided into such as is of use in warlike operations and such as is not. With reference to the latter the power of the belligerent has gradually been reduced to a minimum. In fact the better usage at the present time is for the belligerent not to disturb it, except in so far as necessary to military operations. This class of property includes works of art, churches, museums, books, state archives, fishing smacks, ships for exploration, etc. The exemption of this class from capture or destruction by the belligerent has been established within the last century.

Kinds of property.

The action of the Congress of Vienna in compelling France to restore the works of art carried away by Napoleon from the various countries of Europe which he had invaded went a long way toward establishing the present rule. While the motives which prompted the Congress to take this action may have been and probably were selfish, that the principle which the act tended to establish is commendable does not admit of doubt. Among civilized nations, war should certainly be placed upon a higher plane than that of indiscriminate plunder.

Action of Congress of Vienna.

of the property of an enemy, regardless of whether or not such capture or destruction serves a useful military purpose. Such is the conclusion that has been reached by a majority of the states, and, if it is departed from in practice, the departure is looked upon as a violation of law which may furnish an excuse for reprisals, but not a precedent.

**Fishing vessels.** One species of this class of property deserves brief special notice, because of the peculiar history of the practice with reference to it. The species referred to is that of fishing vessels. By the middle of the sixteenth century a custom had grown up as between England and France not to disturb the channel fishermen. The French ordinances of 1543 and 1584 merely recognized this custom. They gave to the Admiral of France the authority to grant fishing truces to subjects of the enemy, provided reciprocal rights were granted to French fishermen. This custom was practically repealed by the ordinances of 1681 and 1692, and from that time until after the American Revolution fishing vessels were subjects of capture.

**Controversy between England and France.** In 1800 the British government announced that while in its practice it exempted fishing vessels from capture, such conduct was a matter of grace and not a requirement of law. So that when it suspected that such vessels were being used for warlike purposes it insisted upon its right to capture them. If its suspicion were well-founded, it undoubtedly had the right. Yet Napoleon pronounced its conduct "contrary to all the usages of civilized nations." It will be remembered, however, that Napoleon was not always a safe authority upon questions of international law. Hall characterizes this declaration of Napoleon as "merely one of those utterances of generous sentiment with which he

was not unaccustomed to clothe bad faith." (International Law, p. 467.) The position of the British government was well stated by Lord Stowell in the case of *The Young Jacob*, (1 Robinson 20): "In former wars it has not been usual to make captures of these small fishing vessels; but this was a rule of comity only and not of legal decision; it prevailed from views of mutual accommodation between neighboring countries and from tenderness to a poor and industrious order of people. In the present war there has, I presume, been sufficient reason for changing this mode of treatment and as they are brought before me for my judgment they must be referred to the general principles of this court." The possibilities of using fishing smacks for warlike purposes are far less now than at that time. The present rule exempting them is well stated by the Supreme Court of the United States in the case of the *Paquete Habana* (175 U. S. 677.) The vessels engaged in the deep-sea fisheries have not been accorded exemption.

Ships used for purposes of exploration and scientific research have for over a century been accorded exemption from capture. The first notable instance of this kind is the case of Captain Cook, who circumnavigated the globe in 1776, and for whose protection the French naval authorities issued orders to their commanders. In 1803 similar orders were issued concerning the ship *Investigator*, which was used by Flinders for scientific purposes. But by a narrow decision of the prize court these orders were held not to cover *The Cumberland*, for which the *Investigator* was exchanged.

With reference to the above kinds of property there are, then, two grounds upon which their exemption from capture is based: (1) They are of very little, if any, use for warlike purposes and therefore their destruction or

Ships of exploration.

Grounds for exemption.

capture would tend but to a very small degree to overcome the resistance of the other state, and (2) The loss would in most cases fall upon non-combatants and the hardships be out of all proportion to the end attained. Such being the case it is very unlikely that the old rule will ever be reverted to with reference to these classes of property.

**Kinds of enemy property of use in war.** Of enemy property which is of use in war there are two kinds: (1) That which is of use only in war, this is subject to capture or destruction regardless of ownership or location; (2) That which is in use in peace as well as in war, the rights of a belligerent over this kind of property depends upon circumstances which will be considered later. We will merely say here that it is not necessarily subject to confiscation or destruction and that the tendency is to reduce the power of the belligerent over such form of enemy property.

**Forms of enemy property.** As to form, property is either real or personal. When the former falls into the military possession of an enemy such possession confers upon him merely the usufruct, the title not being affected until possession ripens into conquest. And if the real property is owned by individuals, not by the state, the title is not affected by conquest. The right to use, but not to waste, and the right to collect taxes, to exact contributions and requisitions from the persons living upon the real property in the

**Power over real property.** possession of an enemy is considered in the chapter on military occupation. The personal property of a state, if subject to capture, becomes the property of the enemy as soon as he comes fully into possession of it. But if it belongs to individuals, it should be paid for or the validity of its capture considered and passed upon by a competent tribunal, before confiscation.

Debts due from the enemy to individuals should not

be confiscated. Neither should the interest thereon be sequestrated. Whether the ground of this exemption is the fear that the opposite rule would make it harder for states to borrow or the fact that as the debt cannot be enforced in a court of justice makes it peculiarly a debt of honor and hence something which states should not interfere with, the rule of exemption is now thoroughly established. The right to confiscate debts due from a sovereign was exhaustively argued in the case of the threat of Frederick II. in 1753 to confiscate the Silesian loan, by way of reprisal for the seizure of Prussian ships by England. The opinion of Lord Mansfield upon this question, although characterized by Montesquieu as "reponse sans repliche," is in many ways a masterpiece.

Debts not to be  
confiscated.

The Silesian  
loan.

With respect to location the power of a belligerent over enemy's property differs according as that property is within the territory of the belligerent state, within the territory of the enemy state, within the territory of a neutral state, or not within the territory of any state.

As to location.

With reference to enemy property located within the territory of the other belligerent at the outbreak of war it was formerly lawful for him to confiscate it at once upon the beginning of hostilities. But the harshness of this rule has for some time been recognized and the custom of giving an enemy who chances to be in the other state at the breaking out of war a reasonable time in which to dispose of his property and leave the country has become so well fixed as to be considered a rule of international law.

Property within  
Territorial  
limits of bellig-  
erent.

As early as 1812 it was decided by the Supreme Court of the United States in the case of *Brown v. the United States* (8 Cranch 110) that enemy property within our

Rule laid down  
by Supreme  
Court.

**Act of Confed-  
eracy.**

territory at the breaking out of war could not be confiscated without a specific act of Congress authorizing it. The only instance of confiscations of this sort since the Napoleonic wars is to be found in a resort by the Southern Confederacy to this relic of barbarism. By an act passed in August, 1861, it provided that "property of whatever nature, except public stocks and securities, held by an alien enemy since the 21st of May, 1861, shall be sequestered and appropriated." This did not fail to call forth a protest from Lord Russell on behalf of the British government. In his protest he says, among other things, that "whatever may have been the abstract rule of the law of Nations in former times, instances of its application in the manner contemplated by this act are, in modern and more civilized times, rare and generally condemned."

**When enemy  
owner is non-  
resident.**

If the enemy owner cannot dispose of his property and does not wish to remain with it, or has not himself been in the country at all, he is simply deprived of the enjoyment of his property during the war, as the rule of non-intercourse during war deprives him of the right to receive the rents or produce from his property. But it is not confiscated, and, except in so far as the exigencies of military operations make it necessary, the property is not disturbed. As soon as the war terminates he comes again into full enjoyment of it.

**Treaties.**

Most countries now have treaties providing against confiscations and fixing a reasonable time, usually six months, for the disposition or removal of goods. The Treaty of Utrecht made provision for reparation in cases of confiscations that had taken place during the war which it terminated. From that time on it has

been considered more wise to provide in advance against confiscations.

This rule against confiscations of enemy property upon land applies to ships of the enemy which chance to be in the belligerent's ports at the breaking out of war. And, though not so well established, the rule is rapidly ripening into law that merchant vessels of the enemy when driven onto the coasts or into the ports of the belligerent by stress of weather, by the breaking down of their machinery, or other cause than their own hostile acts, are exempt from capture and confiscation.

**Ships of enemy  
in belligerent  
ports at out-  
break of war.**

Not very long ago such shipwrecked or unseaworthy vessels when driven to an inhospitable coast were considered as treasure trove and were indiscriminately plundered. Vessels of the enemy entering the ports of a belligerent in ignorance of the outbreak of war are generally given a reasonable time in which to depart, but their confiscation would not at present be a violation of law, apart from any treaties upon the subject. Yet the growing sense of the advisability of applying a rule which is fair to all concerned and exempts the innocent from unnecessary hardship will no doubt soon convert this commendable custom into a well recognized rule of law.

**Shipwrecked  
enemy vessels.**

The right of a belligerent over the property of the enemy which is within the enemy's territory rests upon military occupation and hence a discussion of it belongs properly to the chapter upon that subject. Yet it may not be out of place to call attention at this point to the fact that this right has shrunk to a remarkable degree. The change from the old Roman doctrine that as soon as a belligerent ousted an enemy from the possession of any portion of his property, whether real or personal, public or private, that property became

**Enemy property  
in his own terri-  
tory.**

*nullius res* and appropriation of it by the belligerent was all that was necessary to transfer the title in it to him,—the change from this extremely harsh doctrine to the infinitely milder and more humane one that, as to the property of the enemy-state, military occupation transfers the title to personal property and leaves the title to the real property in the enemy until transferred by cession or conquest, and as to private property, if real estate, the title is unaffected and if personalty the owner should receive compensation for it, is a change amounting to a revolution.

Property of  
enemy within  
neutral state.

With reference to enemy's property within the limits of a neutral state the belligerent has no right over it while it remains within the neutral state, any attempt upon the part of the belligerent to interfere by force with such property would be in derogation of the sovereignty of the neutral and might readily be considered as a *casus belli*. But if purchased or produced by the enemy—state or its citizens, it is enemy property and as soon as it is moved so that it is no longer within the jurisdiction of a neutral it loses the protection afforded by the laws of neutral states and becomes subject to capture and confiscation, just the same as other enemy property. And where the property of a neutral is sold to an enemy and shipped from a neutral port it becomes enemy property as soon as it is delivered to the master of the vessel, independently of any special agreement between the parties to the contrary. The purpose of this is to prevent the protection of enemy property under the fraudulent claim that it is still neutral property.

Enemy property  
within terri-  
torial waters.

Disputes have arisen as to the right of a belligerent over enemy property within territorial waters. In principle, at least, the matter is very clear, though of



course there is frequently abundant room for questions of fact as to whether or not the property was within territorial waters. The right of capture cannot be exercised within the territorial waters of a state which is really neutral, since the jurisdiction of a neutral extends to its territorial waters as well as to its territory. Within its own territorial waters the belligerent may exercise the right of capture over enemy's property, subject to the exceptions to which we have already called attention. The right of capture may be exercised by a belligerent within the territorial waters of his enemy the same as on the open sea.

This brings us to a discussion of the right of a belligerent over the property of the enemy when not located within the territorial jurisdiction of any state, i. e., when on the open sea. According to the old rule, the property of an enemy at sea was subject to capture and confiscation by a belligerent under whatever circumstances it was found, it mattered not whether the ship carrying it belonged to a neutral or to the enemy. But this rule bore heavily upon private citizens and interfered very seriously, and more than was really necessary, with commercial intercourse. So far as concerned the property of the enemy-state found on the sea, there was and is little objection to this rule, as it consists almost entirely of fighting ships and other forms of contraband goods which it seems natural enough should be subject to capture and confiscation. But as to the property of private citizens of the enemy which was needed by neutrals, it did not seem so natural that this should be seized by the belligerent, who would thus be permitted to derange the commerce of neutrals and bring distress upon them, perhaps, and certainly upon non-combatants of the enemy. As the

Enemy property  
on open sea.

Public and pri-  
vate property.

conviction that this was unnecessary and that the derangement to commerce and distress wrought were out of proportion to the end attained there was effected a change in the legal rights of the belligerent. But before proceeding directly to trace the steps in this change, it will be well to note the methods that have prevailed for determining what constituted enemy property on sea.

What constitutes enemy property at sea.

Rule of *sum cuique*.

The earliest of these methods of which a definite statement is to be found is contained in the *Consolato del Mare*. This laid down the simple and natural method that the ownership of the vessel determined whether or not it was subject to capture and the ownership of the goods decided their fate. In other words, either could be captured, if belonging to the enemy, but neither if belonging to a neutral. This principle of *sum cuique* has been termed the "common law of the sea," and was pronounced by Chief Justice Marshall to be the "original law of Nations on the subject of captures." This is the rule still followed by the United States and Great Britain, with the difference that the United States considers it immaterial whether they are carried upon an armed or unarmed ship of the enemy, while Great Britain holds that transporting them on an armed vessel of the enemy makes them enemy goods, although the title to them was in a neutral when placed upon the vessel. As warships carry very little freight, this difference is not a very practical one. As to goods found upon a merchant vessel of the enemy the presumption is that they are enemy goods, but this presumption may be rebutted by proper evidence as to the ownership of the goods. The ship papers, if regular, furnish this evidence.

By the middle of the seventeenth century the right

of belligerents was so far limited that when they seized goods of the enemy upon a neutral ship they were under obligation to pay to the neutral the freight for the whole journey, as capture was for this purpose considered equivalent to delivery. Yet the freight to be paid was not necessarily the contract price, but a reasonable price. The belligerent was also held for damages caused to the ship by removing the goods. In order to claim these rights the neutral ship was required to refrain from any attempt to assist the enemy. If it either attempted to resist search or to blend the enemy's goods with those of neutrals, it not only lost its right to freight on the enemy goods, but the whole cargo was confiscated.

Neutral ship  
entitled to  
freight on  
enemy goods  
captured.

For the doctrine of *suum cuique* as a method of determining what were enemy goods, the French attempted in the sixteenth century to substitute the doctrine of hostile infection, i. e., a neutral ship was polluted and rendered liable to capture by carrying enemy goods and neutral goods were likewise infected if loaded on an enemy ship. This doctrine has been reduced to the formula:

Doctrine of  
hostile infection.

Enemy ship—enemy goods.

Enemy goods—enemy ship.

French practice was made to conform to this formula from the time of Francis I. down to the Declaration of Paris, or just about three centuries.

We find in the Dutch doctrine a variation from both of these. According to this doctrine the nationality of the ship determines the nationality of the cargo, so that enemy goods could be found only on enemy ships. Grotius and Bynkershoek contended that the presumption that the goods were of the same national character as the ship was a rebuttable, not a conclusive one. That

Dutch doctrine.

is to say, they abandoned the doctrine of their country for the "common law of the sea." The part of the Dutch doctrine which has become permanent is that embodied in the formula: Free ships—free goods. The other part of the formula: Enemy ship—enemy goods — has not been incorporated into international law.

Declaration  
Paris.

The Declaration of Paris, though it has not been formally accepted by the United States, Mexico and Spain, has been practically accepted by them and is the legal doctrine of to-day. This provides that: "The neutral flag covers enemy cargo, except contraband of war," and that "neutral goods, except contraband of war, are not liable to capture under the enemy's flag." By it, goods do not become enemy goods in any fictitious way, but simply by production or transfer. It leaves as enemy property subject to capture, simply enemy goods on enemy ships, unless the goods by their nature fall within the class of contraband goods.

Rule as to  
capture.

Having examined the rules for determining what is enemy property on sea, we will now inquire what constitutes a valid capture. All are agreed that there must be an effectual seizure in order to transfer the property of an enemy to the belligerent. But different rules have been applied in determining when an effectual seizure has taken place. If the question were simply one between the belligerent and his enemy there would be no particular need of rules for determining when the seizure is effectual, as the question would be wholly one of force, and whenever an enemy considered that the seizure was not backed up by sufficient force he would be at liberty to test the matter. But as neutrals or allies may acquire interests in them by rescue, recapture, or purchase, it becomes important to fix upon some rule

Important in  
determining  
neutral rights.

or rules for determining whether or not the capture was sufficiently complete to divest the owner of his right to the goods and so enable others to acquire title from the belligerent captor. If the owner has acknowledged the completeness of the capture by surrendering his claim to the ship or goods, the question is a very simple one, but this is not usually the case.

According to the *Consolato del Mare*, a capture was not complete until the ship or goods were brought to a place of safety, i. e., within the protection of the captor's camp, fortress, port or fleet. If before this arrival at a place of safety they were recaptured, the owner could again come into possession of them by payment of reasonable salvage; but if recapture took place after it had been taken to a place of safety, the property belonged to the recaptor, as the owner's right to it had been extinguished. This rule was based upon the principle of Roman law with reference to the capture of persons: "Antequam in praesidia perducatur hostium manet civis." Rule of the Consolato del Mare.

But alongside of this rule there grew up another which we may call the French rule, as it begins with an edict of France in 1584. It is also called the twenty-four hour rule. Within a century it had been adopted by about half of Europe, but from that time on its popularity began to wane, and now it has been abandoned by those countries basing their law upon the Code Napoleon and by England as well. Yet for a considerable time it was doubtful which was the more authoritative rule, particularly during the eighteenth and part of the nineteenth century. So that Wheaton, writing in the early part of the latter century, considers both rules as having the sanction of law and Lord Stowell French rule.

says in the case of *The Santa Cruz* (1 Robinson 60) that 'a bringing infra *præsidia* is probably the true rule.'

Application of  
twenty-four  
hour rule.

When the twenty-four hour rule is applied, the possession must have been continuous during the twenty-four hours, and with intent to appropriate; this is usually evidenced by putting a prize crew on board and registering the time of capture upon the ship's papers, yet other evidence may be satisfactory to the court.

Disposition of  
captured prop-  
erty.

As to the disposition of the captured property there is a generally recognized obligation to safeguard neutral rights. If the question were simply one between the belligerents, the captor might do what he pleased with the property, for, since the enemy's right in it has been extinguished, he would have no right to complain whether the captor chose to sell it, abandon it, destroy it or ransom it. But as neutrals frequently have rights in part or all of the goods it is now recognized that in order to prevent injury to this right the captor should send the property to a prize court, where the neutral's rights, if any, may be protected. Conditions may render such a course impracticable, in which case the belligerent acts under what seems to be the necessities of the case and assumes the risks. This course was pursued by John Paul Jones during the Revolutionary war, and was later adopted under instructions from our government during the war of 1812. The circumstances which justify the destruction of prizes are well stated by Lord Stowell in his judgment in the case of *The Felicity* (2 Dodson, 383): "The captors fully justify themselves to the law of their own country which prescribes the bringing in, by showing that the immediate service in which they were engaged, that of watching the enemy's ship of war, *The President*, with intent to encounter her, though of inferior force, would not permit them to part with any

of their crew to carry her into a British port. Under this collision of duties nothing was left but to destroy her, for they could not, consistently with their duty to their own country, or indeed its express injunctions, permit enemy's property to sail away unmolested. If impossible to bring in, their next duty is to destroy enemy's property." In case it becomes necessary to destroy a captured ship the crew must be taken care of. Lord Stowell's opinion.

A more advantageous method of disposing of a captured ship or goods is to accept from the enemy owner or his agent a ransom bill, which contains a description of the ship and goods and a stipulation that the owner will pay a certain amount to the captor. The bill is made out in duplicate, one copy being kept by the ransomed vessel to protect it during the remainder of its voyage to a port agreed upon, and the other copy by the captor as an evidence of his claim. Russia and a few other countries do not allow ransoming of enemy property, but the United States does under certain circumstances. If the captor is himself captured with the ransom bill before reaching a place of safety the bill is thereby rendered null. Ransom.  
Practice as to ransom.

Until the prize has been taken to a place of safety the captor's right may be ended by recapture or rescue by the captured crew. In this case the right of the original owner revives and he may claim the ship or goods, subject to the obligation of paying salvage to the recaptors. According to the American rule the right of the original owner is not extinguished, and hence the right of recapture ended until the property has been passed upon by a prize court. British and American courts have refused to return to their captors, ships rescued by their crews. (See cases of the *Emily*, *St. Pierre* and *The Experience*, Snow's cases, 361-63). In case of abandon- Recapture.

ment by the captors, neutral courts award salvage to the recaptors, but will not pass upon the relative rights of the captors and original owners.

Contention for  
exemption of all  
private property  
at sea from  
capture.

The United States has for nearly a century contended for the principle of the exemption from capture of all private property at sea, contraband excepted. The acceptance of this principle by the powers of Europe was urged by Secretary Marcy when the United States was invited to adhere to the Declaration of Paris. Yet for some reason his counter proposition was refused. In 1870 Mr. Fish urged the acceptance of this "as another restraining and humanizing influence imposed by modern civilization on the art of war." The following year a treaty was concluded between the United States and Italy embodying this principle. It has also been applied by Prussia and Austria, and accepted in principle by Russia, provided it was accepted by the other states of Europe. But it cannot as yet be said to be a part of international law. The reasonableness of the rule, together with the fact that it has been successfully applied to warfare on land among all civilized nations will undoubtedly secure its extension to warfare on sea. It is true that certain very able writers, particularly Hall, argue for a continuance of the present rule; but their arguments are by no means conclusive. The gist of the arguments of this school is that the present rule is the established law, that it is not as bad as confiscations of private property on land, and no worse than some other things now practiced in war. This, however, does not touch the real question, which is: would the exemption contended for be a substantial improvement over the present rule? That it accords with the theory that war is a conflict between states—a theory that has contributed much toward ameliorating the harsh condi-



tions of war—does not admit of doubt. The nation which stands most in the way of a change is the English, which because of the strength of its navy, feels that it would be poor policy to give up the means of crippling an enemy which the present rule affords. Yet England may come to see that the present rule cuts both ways, as it would tend materially to cut off her food supply during a war between her and a country possessing a reasonably strong fleet of commerce destroyers. The change would render the cutting off of her supply of food and raw materials for manufacture impossible, except by a blockade of her coast. Therefore, selfishness, which it is claimed by England is the motive which has impelled the United States to champion the new rule, may yet impel England to abandon the old.

That England is gradually coming to this conclusion is shown by the conclusions of the Royal Commission appointed in 1893 for the purpose of investigating the question of the supplies of food and raw material during a naval war. These, they concluded, were endangered in the following ways: (1) "The seizure by the enemy of ships and cargo belonging to this country; (2) The possible establishment of a blockade of our coasts; and (3) The possibility that certain foodstuffs might be held by certain nations to come under their definition of contraband."

**Report of Royal  
Commission.**

Of these, they considered the first to be by far the most important; and upon this basis a very respectable minority reached the logical conclusion that "if the proposed conference were to result in the abrogation of the existing rule, all the difficulties we have been instructed to consider would disappear, and all proposed remedies would disappear. In our opinion, the evidence laid before us tended to show that the rule no longer

does, if it ever did, subserve the real interests of this country. We desire accordingly to qualify our acceptance of the report by the reservation that a full consideration of this most important question should precede the adoption of any suggested remedy. And we may add that the severity of the existing rule had much effect in inducing us to accept the conclusion of the report on the subject of indemnity."

**General attack upon commerce unlikely.** That the present rule would not be of very great value to Great Britain was the general opinion of the Commissioners, who as a result of communications with the admiralty, expressed the conclusion that "Even if an attack on commerce were attempted, it probably could not last long, since the vital importance of obtaining supremacy at sea is now so well understood by all maritime nations, that it seems unlikely any of them would deliberately spend their strength in attempting such an enterprise as a general attack on commerce until the main issue had been decided."

**View of J. S. Mill.** In contemplating the effect upon the British carrying-trade of a maritime war to which Great Britain was a party, Englishmen are considering seriously the reasoning of John Stuart Mill that "if our commerce would be safe in neutral bottoms, but unsafe in our own, then if the war were of any duration our whole export and import trade would pass to the neutral flags, and most of our merchant shipping would be thrown out of employment. A protracted war on such lines would end in national disaster. It will then become an actual necessity for us to take the second step and obtain the exemption of all private property at sea from the contingencies of war."

Even more direct and positive is the expression of opinion made by the representatives of trade before the

Royal Commission: "It is difficult to overrate the seriousness of the danger to our shipping. There is, *so long as private property at sea remains liable to hostile capture*, no single, complete way out of the difficulty."

View of Eng.  
representatives  
of trade.

The result of the investigations by the Royal Commission on Food Supply is summed up by Mr. Robertson as follows: "This rule has been retained in International Law mainly by the refusal of Great Britain to consent to its abolition, at a time when her economical and even her naval position in relation to other nations was quite unlike what it is now; that the rule has been gradually falling into discredit—partially in this country, generally in others; that there is good ground for thinking that the right of capture is of no great value to us, and also that it will not in fact be exercised to any great extent until the closing stages of the war; that there is also good ground for thinking that, apart from the mere mention of supplies, the rule, taken in connection with the Declaration of Paris, must have the effect of transferring a large portion of our vast carrying trade to neutrals flags."

Result of investigation by commission.

That other nations would probably consent to the abolition of the old rule may fairly be inferred from the expression of their representatives at the close of the Peace Conference of 1899. Before adjourning they expressed their sentiments as follows: "The Conference expresses the wish that the proposal which contemplates the declaration of the inviolability of private property in naval warfare may be referred to a subsequent conference for consideration."

View of other  
nations.

**PRIZE CASES.**

(2 Black, 685.)

**WHAT IS ENEMY'S PROPERTY?**

We come now to the consideration of the second question, What is included in the term "enemies property?"

Is the property of all persons residing within the territory of the States now in rebellion, captured on the high seas, to be treated as "enemies property" whether the owner be in arms against the government or not?

The right of one belligerent not only to coerce the other by direct force, but also to cripple his resources by the seizure or destruction of his property, is a necessary result of a state of war. Money and wealth, the products of agriculture and commerce, are said to be the sinews of war, and as necessary in its conduct as numbers and physical force. Hence it is, that the laws of war recognize the right of a belligerent to cut these sinews of the power of the enemy, by capturing his property on the high seas.

The appellants contend that the term "enemy" is properly applicable to those only who are subjects or citizens of a foreign State at war with our own. They quote from the pages of the common law, which say, "that persons who wage war against the king may be of two kinds, subjects or citizens. The former are not proper enemies, but rebels and traitors; the latter are those that come properly under the name of enemies."

They insist, moreover, that the President himself, in his proclamation, admits that great numbers of the persons residing within the territories in possession of the insurgent government, are loyal in their feelings, and forced by compulsion and the violence of the rebel-

lions and revolutionary party and its "de facto government" to submit to their laws and assist in their scheme of revolution; that the acts of the usurping government cannot legally sever the bond of their allegiance; they have, therefore, a co-relative right to claim the protection of the government for their persons and property, and to be treated as loyal citizens, till legally convicted of having renounced their allegiance and made war against the government by treasonably resisting its laws.

They contend, also, that the insurrection is that of individuals and not of a government or sovereignty; that the individuals engaged are subjects of law. That confiscation of their property can be effected only under a municipal law. That by the law of the land such confiscation cannot take place without the conviction of the owner of some offense, and finally, that the secession ordinances are nullities and ineffectual to release any citizen from his allegiance to the national government, and consequently that the constitution and the laws of the United States are still operative over persons in all the States for punishment as well as protection.

This argument rests on the assumption of two propositions, each of which is without foundation in the established law of nations. It assumes that where a civil war exists, the party belligerent claiming to be sovereign, cannot, for some unknown reason, exercise the rights of belligerents, although the revolutionary party may. Being sovereign, he can exercise only sovereign rights over the other party. The insurgent may be killed on the battle-field or by the executioner; his property on land may be confiscated under the municipal law; but the commerce on the ocean, which supplies the

rebels with means to support the war, cannot be made the subject of capture under the laws of war, because it is "unconstitutionnal!!!" Now, it is a proposition never doubted, that the belligerent party who claims to be sovereign, may exercise both belligerent and sovereign rights (see 4 Cr. 272). Treating the other party as a belligerent, and using only the milder modes of coercion which the law of nations has introduced to mitigate the rigors of war, cannot be a subject of complaint by the party to whom it is accorded as a grace or granted as a necessity. We have shown that a civil war as that now waged between the northern and southern States is properly conducted according to the humane regulations of public law as regards capture on the ocean.

Under the very peculiar constitution of this government, although the citizens owe supreme allegiance to the federal government, they owe also a qualified allegiance to the State in which they are domiciled. Their persons and property are subject to its laws.

Hence, in organizing this rebellion, they have acted as States claiming to be sovereign over all persons and property within their respective limits, and asserting a right to absolve their citizens from their allegiance to the federal government. Several of these States have combined to form a new confederacy, claiming to be acknowledged by the world as a sovereign State. Their right to do so is now being decided by wager of battle. The ports and territory of each of these States are held in hostility to the general government. It is no loose, unorganized insurrection, having no defined boundary or possessions. It has a boundary marked by lines of bayonets, and which can be crossed only by force—south of this line is "enemies" territory, because it is

claimed and held in possession by an organized, hostile and belligerent power.

All persons residing within this territory whose property may be used to increase the revenues of the hostile power are, in this contest, liable to be treated as enemies, though not foreigners. They have cast off their allegiance and made war on their government, and are none the less enemies because they are traitors.

But in defining the meaning of the term "enemies' property," we will be led into error if we refer to Fleta and Lord Coke for their definition of the word "enemy." It is a technical phrase peculiar to prize courts, and depends upon principles of public policy as distinguished from the common law.

Whether property be liable to capture as "enemies' property" does not in any manner depend on the personal allegiance of the owner. "It is of no consequence whether it belongs to an ally or a citizen. (8 Cr. 384.) The owner, *pro hac vice*, is an enemy." (3 Wash. C. C. R. 183. )

The produce of the soil of the hostile territory, as well as other property engaged in the commerce of the hostile power, as the source of its wealth and strength, are always regarded as legitimate prize, without regard to the domicile of the owner, and much more so if he reside and trade within their territory.

**BROWN v. THE UNITED STATES.**

(8 Cranch, 110.)

**ENEMY PROPERTY WITHIN TERRITORY OF BELLIGERENT AT  
COMMENCEMENT OF WAR.**

Marshall, C. J., delivered the opinion of the court, as follows:

The material facts in the case are these:

The *Emulous*, owned by John Delano and others, citizens of the United States, was chartered to a company carrying on trade in Great Britain, one of whom was an American citizen, for the purpose of carrying a cargo from Savannah to Plymouth. After the cargo was put on board, the vessel was stopped in port by the embargo of the 4th of April, 1812. On the 25th of the same month it was agreed between the master of the ship and the agent of the shippers, that she should proceed with her cargo to New Bedford, where her owners resided, and remain there without prejudice to the charter party. In pursuance of this agreement, The *Emulous* proceeded to New Bedford, where she continued to remain until after the declaration of war. In October or November, the ship was unloaded and the cargo, except the pine timber, was landed. The pine timber was floated up a salt-water creek, where, at low tide, the ends of the timber rested on the mud, where it was secured from floating out with the tide, by impediments fastened in the entrance of the creek. On the 7th of November, 1812, the cargo was sold by the agent of the owners, who is an American citizen, to the claimant, who is also an American citizen. On the 19th of April, a libel was filed by the Attorney for the United States, in the District Court of Massachusetts, against the said cargo, as well on behalf of the United States of America as for and in behalf of John Delano and of all other persons concerned. It does not appear that this seizure was made under any instructions from the President of the United States; nor is there any evidence of its having his sanction, unless the libel's being filed and prosecuted by the law officer who represents the government must imply that sanction.



On the contrary, it is admitted that the seizure was made by an individual, and the libel filed at his instance, by the district attorney, who acted from his own impressions of what appertained to his duty. The property was claimed by Armitz Brown, under the purchase made in the preceding November.

The District Court dismissed the libel. The Circuit Court reversed this sentence, and condemned the pine timber as enemy property forfeited to the United States. From the sentence of the Circuit Court, the claimant appealed to this court.

The material question made at bar is this: Can the pine timber, even admitting the property not to be changed by the sale in November, be condemned as prize of war?

The cargo of *The Emulous* having been legally acquired and put on board the vessel, having been detained by an embargo not intending to act on foreign property, the vessel having sailed before the war, from Savannah, under a stipulation to reland the cargo in some part of the United States, the relanding having been made with respect to the residue of the cargo, and the pine timber having been floated into shallow water, where it was secured and in the custody of the owner of the ship, an American citizen, the court cannot perceive any solid distinction, so far as respects confiscation, between the property and other British property found on land at the commencement of hostilities. It will, therefore, be considered as a question relating to such property generally, and to be governed by the same rule.

Respecting the power of government no doubt is entertained. That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. The mitigations

of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself. That remains undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will. But until that will shall be expressed, no power of condemnation can exist in the court.

The questions to be decided by the court, are:

1st. May enemy's property found on land at the commencement of hostilities be seized and condemned as a necessary consequence of the declaration of war?

2nd. Is there any legislative act which authorizes such seizure and condemnation?

Since, in this country, from the structure of our government, proceedings to condemn the property of an enemy found within our territory at the declaration of war, can be sustained only upon the principle that they are instituted in execution of some existing law, we are led to ask:

Is the declaration of war such a law? Does that declaration, by its own operation, so vest the property of the enemy in the government, as to support proceedings for its seizure and confiscation, or does it vest only a right, the assertion of which depends on the will of the sovereign power?

The universal practice of forbearing to seize and confiscate debts and credits, the principle universally received, that the right to them revives on the restoration of peace, would seem to prove that war is not an absolute confiscation of this property, but simply confers the right of confiscation.

Between debts contracted under the faith of laws, and property acquired in the course of trade, on the

face of the same laws, reason draws no distinction; and, although, in practice, vessels with their cargoes, found in port at the declaration of war, may have been seized, it is not believed that modern usage would sanction the seizure of the goods of an enemy on land, which were acquired in peace, in the course of trade. Such a proceeding is rare, and would be deemed a harsh exercise of the rights of war. But although the practice in this respect may not be uniform, that circumstance does not essentially affect the question. The inquiry is, whether such property vests in the sovereign by the mere declaration of war, or remains subject to a right of confiscation, the exercise of which depends on the national will; and the rule which applies to one case, so far as respects the operation of a declaration of war on the thing itself, must apply to all others over which war gives an equal right. The right of the sovereign to confiscate debts being precisely the same with the right to confiscate other property found in the country, the operation of a declaration of war on debts and on other property found within the country must be the same. What, then, is this operation?

Even Bynkershoek, who maintains the broad principle, that in war everything done against an enemy is lawful; that he may be destroyed, though unarmed and defenseless; that fraud, or even poison, may be employed against him; that almost unlimited right is acquired over his person and property; admits that war does not transfer to the sovereign a debt due to his enemy; and, therefore, if payment of such debt be not exacted, peace revives the former right of the creditor; "because," he says, "the occupation which is had by war consists more in fact than in law." He adds to his observations on this subject, "let it not, however, be sup-

posed that it is only true of actions, that they are not condemned *ipso jure*, for other things also belonging to the enemy may be concealed and escape condemnation."

Vattel says, that "the sovereign can neither detain the person or the property of those subjects of the enemy who are within his dominions at the time of the declaration."

It is true that this rule is, in terms, applied by Vattel to the property of those only who are personally within the territory at the commencement of hostilities; but it applies equally to things in action and to things in possession; and if war did, of itself, without any further exercise of the sovereign will, vest the property of the enemy in the sovereign, his presence could not exempt it from this operation of war. Nor can a reason be perceived for maintaining that the public faith is more entirely pledged for the security of property trusted in the territory of the nation in time of peace, if it be accomplished by its owner, than if it be confided to the care of others.

Chitty, after stating the general right of seizure, says: "But, in strict justice, that right can take effect only on those possessions of a belligerent which have come to the hands of his adversary after the declaration of hostilities."

The modern rule, then, would seem to be, that tangible property belonging to an enemy, and found in the country at the commencement of war, ought not to be immediately confiscated; and in almost every commercial treaty an article is inserted stipulating for the right to withdraw such property.

This rule appears to be totally incompatible with the idea that war does of itself vest the property in the belligerent government. It may be considered as the opin-

ion of all who have written on the *jus belli*, that war gives the right to confiscate, but does not itself confiscate the property of the enemy; and their rules go to the exercise of this right.

The Constitution of the United States was framed at a time when this rule, introduced by commerce in favor of moderation and humanity was received throughout the civilized world. In expounding that constitution, a construction ought not lightly to be admitted, which could give to a declaration of war an effect in this country it does not possess elsewhere, and which would fetter that exercise of entire discretion respecting enemy property, which may enable the government to apply to the enemy the rule that he applies to us.

If we look to the constitution itself, we find this general reasoning much strengthened by the words of that instrument.

That the declaration of war has only the effect of placing the two nations in a state of hostility, of producing a state of war, of giving those rights which war confers; but not of operating, by its own force, any of those results, such as transfer of property, which are usually produced by ulterior measures of government, is fairly deducible from the enumeration of powers, which accompanies that of declaring war. "Congress shall have power"—"to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."

It would be restraining this clause within narrower limits than the words themselves import, to say that the power to make rules concerning captures on land and water, is to be confined to captures which are extritorial. If it extends to rules respecting enemy property

found within the territory, then we perceive an express grant to Congress of the power in question as an independent substantive power, not included in that of declaring war.

The acts of congress furnish many instances of an opinion that the declaration of war does not, of itself, authorize proceedings against the person or property of the enemy found, at the time, within the territory.

War gives an equal right over persons and property; and if its declaration is not considered as prescribing a law respecting the person of an enemy found in our country, neither does it prescribe a law for his property. The act concerning alien enemies, which confers on the President very great discretionary powers respecting their persons, affords a strong implication that he did not possess those powers by virtue of the declaration of war.

The "act for the safe keeping and accommodation of prisoners of war," is of the same character.

The act prohibiting trade with the enemy, contains this clause:

"And be it further enacted, that the President of the United States be, and is hereby authorized to give, at any time, within six months after the passage of this act, passports for the safe transportation of any ship or oher property belonging to British subjects, and which is now within the limits of the United States."

The phraseology of this law shows that the property of a British subject was not considered by the legislature as being vested in the United States by the declaration of war; and the authority which the act confers on the President, is manifestly considered as one which he did not previously possess.

The proposition that a declaration of war does not,

in itself, enact confiscation of the property of the enemy within the territory of the belligerent, is believed to be entirely free from doubt. Is there, in the act of Congress, by which war is declared against Great Britain, any expression which would indicate such an intention?

That act, after placing the two nations in a state of war, authorizes the President of the United States to use the whole land and naval force of the United States to carry the war into effect, and "to issue to private armed vessels of the United States, commissions or letters of marque and general reprisals against the vessels goods, and effect of the government of the United Kingdom of Great Britain and Ireland, and the subjects thereof."

That reprisals may be made on enemy property found within the United States at the declaration of war, if such be the will of the nation, has been admitted; but it is not admitted that, in the declaration of war, the nation has expressed its will to that effect.

It cannot be necessary to employ argument in showing that when the attorney of the United States institutes proceedings at law for the confiscation of enemy property found on land, or floating in one of our creeks, in the care and custody of one of our citizens, he is not acting under the authority of letters of marque and reprisals, still less under the authority of such letters issued to a private armed vessel.

The "act concerning letters of marque, prizes, and prize goods," certainly contains nothing to authorize this seizure.

There being no other act of Congress which bears upon the subject, it is considered as proved that the legislature has not confiscated enemy property which was

within the United States at the declaration of war, and that this sentence of condemnation cannot be sustained.

One view, however, has been taken of this subject, which deserves to be further considered. It is urged that, in executing the laws of war, the executive may seize and the courts condemn all property which, according to the modern law of nations, is subject to confiscation, although it might require an act of the legislature to justify the condemnation of that property which, according to modern usage, ought not to be confiscated.

This argument must assume for its basis the position that modern usage constitutes a rule which acts directly upon the thing itself by its own force, and not through the sovereign power. This position is not allowed. This usage is a guide which the sovereign follows or abandons, at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded.

The rule is, in its nature, flexible. It is subject to infinite modification. It is not an immutable rule of law, but depends on political considerations which may continually vary.

Commercial nations, in the situation of the United States, have always a considerable quantity of property in the possession of their neighbors. When war breaks out, the question, what shall be done with enemy property in our country, is a question rather of policy than of law. The rule which we apply to the property of our enemy, will be applied by him to the property of our citizens. Like all other questions of policy, it is proper for the consideration of a department which can



modify it at will; not for the consideration of a department which can pursue only the law as it is written. It is proper for the consideration of the legislature, not of the executive or judiciary.

It appears to the Court that the power of confiscating enemy property is in the legislature, and that the legislature has not yet declared its will to confiscate property which was within our territory at the declaration of war. The Court is therefore of opinion that there is error in the sentence of condemnation pronounced in the Circuit Court in the case, and doth direct that the same be reversed and annulled, and that the sentence of the District Court be affirmed.

#### THE COPENHAGEN.

(1 Robinson's Admiralty Reports, 243.)

#### SHIPS DRIVEN INTO ENEMY PORTS BY STRESS OF WEATHER.

On a petition to the Court for the settlement of freight for transhipment of Prize Goods, between the ship, cargo and transhippers.

Sir W. Scott.—This is a ship not captured at sea, but seized in a British port, into which she had been driven by stress of weather; as it has been asserted, “merely on account of the Cargo, the ship being duly documented.” Duly documented is altogether a relative term; for a vessel may be duly documented in one case by papers which would not be sufficient documents in another. Thus in ordinary cases, a Danish ship would be duly documented by a Danish pass, and other papers; but if she appeared to have been bought in the enemy's country during the war, a bill of sale would be necessary, and that duly verified and supported. In the present case the Court ordered further proof as well of the

ship as of the cargo—the latter was restored on the 1st of August, 1797. But the original hearing of the ship not coming on till the 20th of August, 1797, the ship was not restored on further proof, till the 28th of May, 1798. The ship having come in originally in distress, and wanting repairs, it became necessary to take out the cargo; and there being no warehouses at hand, it was put on board three other vessels, which very reluctantly engaged in the service, and were finally induced to do so, by a written contract with the master; and as the cargo consisted of commodities brought from Smyrna, these ships were obliged to submit to quarantine; and the commodities being damaged, these vessels sustained some actual injury by having them on board. As the Copenhagen was still farther detained after the cargo was restored, and was therefore unable to prosecute her original voyage, part of the cargo was sent to London, and part was put on board other ships to go to the original destination.

On these facts four questions have arisen; 1st, Whether demurrage is due for the detention of the ship? and this question lies between the owners of the ship and the owners of the cargo; for there is no application for demurrage against the seizors, nor any ground for it. 2ndly, Whether freight is due for the whole voyage, or only pro rata? for that some freight is due is not denied; and this also is a question between the owners of the ship and the owners of the cargo. 3rdly, What sum of money is due to the owners of the three ships? 4thly, The last question arises in some measure out of the preceding one: Whether the owners of the Copenhagen, or the owners of the cargo, are responsible for this sum of money; and also for the expenses of the repairs of the ship, and other charges?

The proprietors of the ship assert that the whole is a matter of simple or particular average on the cargo only; and the owners of the cargo contend that the expenses of transshipment are a matter of general average, falling on all parties, and affecting the ship in common with the cargo; but that the ship alone must bear the expenses of her own repairs.

In the first place, the ship was not brought in by seizure; there was no bringing into port by capture. I think it is perfectly clear that she wanted repair; and that she staid in Milford Haven for that purpose, as well as for the purpose of proving her neutral character. It appears also that the proof of the character of the ship took up more time than that of the cargo. Under these circumstances there cannot be the slightest pretence for a claim of demurrage against the cargo on any ground whatever.

2ndly. With respect to the freight, some is admitted to be due, as the ship has brought her cargo from Smyrna through much the most considerable part of the voyage. But it is said that in matters of prize, the whole freight is always given; and for this reason, because capture is considered as delivery, and a captured vessel earns her whole freight. I have already said that this is not merely or originally a matter of prize; the ship was not brought in as such; she came in first from distress, and was afterwards put upon the proof of her character; it is a case of a mixed nature; and the maxim that capture is delivery, is not to be taken in the general way in which it has been laid down. It is by no means true, except where the captor succeeds fully to the rights of the enemy, and represents him as to those rights. If a neutral vessel, having enemy's goods, is taken, the captor pays the whole freight, because he represents

the enemy by possessing himself of the enemy's goods *jure belli*; and although the whole freight has not been earned by the completion of the voyage, yet as the captor by his act of seizure has prevented its completion, his seizure shall operate to the same effect as an actual delivery of the goods to the consignee, and shall subject him to the payment of the full freight. But if ship and cargo, being both neutral, are restored, the consequence is only that the ship must proceed on and complete her voyage before she can demand her freight. If the cargo is restored whilst the ship continues under detention, still less reason is there to contend that she has earned her whole freight. Such is the present case, in which the ship has failed in her contract, and this not owing to the cargo in any manner, but to her own state of distress originally, and afterwards to her dubious character. Under these circumstances it is impossible to say that she has earned more than a freight *pro rata itineris*, which therefore the registrar and merchants must ascertain in the usual manner.

3rdly. As to the *quantum* of the demand of the owners of the three vessels: It is not denied that they were hired and occupied for a long time as warehouses; and it is no slight circumstance that the cargo was put on board in some degree against the inclination of the owners; they were almost impressed, as it were, into the service. The cargo consisted partly of damaged cotton; and the very stowage occasioned some degree of damage to the ships. Still farther damage was sustained from the delay of quarantine, to which the cargo was necessarily subjected as coming from the Levant. The master of the Copenhagen entered into a written contract with the owners of the three vessels; and I think the master had a right, under such circumstances of neces-

sity, to bind both the owners of the ship and cargo in acting for their service; for a master, under circumstances of necessity, has a general right to hypothecate either of them, or to sell the cargo, or to throw any part of it overboard. There has been a proposal made by the parties to refer the *quantum* to the registrar and merchants. This is what I shall do, intimating only my opinion, that if the written contract is not impeached by fair imputation of negligence, or treacherous abandonment on the part of the master, or by that of gross extortion on the other side in an hour of distress, it is binding on the owners, and ought to be maintained to its full extent.

4thly. When a ship having sustained damage at sea, comes in for repairs and becomes unfit to perform the function for which she is engaged, to contain and to convey the cargo; that in such a case the owners of the ship should claim the expense of repairs from the owners of the cargo, and at the same time refuse to pay any part of the charges of transshipping and conveying the cargo would be very unreasonable. The expenses, severally, may be matter of simple average, or the whole may be matter of general average. General average is for a loss incurred, towards which the whole concern is bound to contribute *pro. rata*, because it was undergone for the general benefit and preservation of the whole. Simple or particular average is not a very accurate expression; for it means damage incurred by or for one part of the concern, which that part must bear alone; so that in fact it is no average at all, but still the expression is sufficiently understood and received into familiar use. The loss of an anchor or cable, the starting of a plank, are matters of simple or particular average, for which the ship alone is liable. Should a

cargo of wine turn sour on the voyage, it would be a matter of simple average, which the goods alone must bear; and there might be a simple average for which each would be severally liable under a misfortune happening to both ship and cargo at the same time, and from a common cause; as if a water-spout should fall on a cargo of sugars, and a plank from the same violence should start at the same time. General average is that loss to which contribution must be made by both ship and cargo; the loss, or expense which the loss creates, being incurred for the common benefit of both. In this case the transshipping, or rather the unloading of the goods, seems to have been for the common benefit of both; for it was necessary to unload the ship, as well for its own repair, which had become indispensable, as for the preservation of the cargo; and therefore the expense of that transshipment, or rather of the unloading, seems to have upon it the character of a general average, though, possibly, it may be hardly worth while to consider the unloading as a charge distinct from the transshipment—and if so, it should seem to belong to the cargo only. The expense of conveying the cargo to its ultimate destination belongs to the cargo only, the contract having been in effect determined by the payment of freight *pro rata itineris*. As to the expense of the repairs, I think that there is no ground to charge the cargo with that; for the reason that the ship and the cargo being completely separated by the determination of the contract, and new vehicles provided at the expense of the cargo, the cargo is not answerable for those repairs which it in no degree occasioned. This is what occurs to me upon the view of the matter. It has been intimated that there is a general rule prevailing in such matters among those most conversant in them—if there

is anything like a law merchant on this subject, I should be very unwilling to shake an established rule on mere speculation; and I shall therefore refer it to the registrar and merchants to inquire respecting the existence of such a rule of practice; and if they are satisfied that such a rule exists with a generally received authority, to apply it in ascertaining the burdens that lie respectively upon the ship and upon the cargo, subject to the further opinion of the Court.

The registrar and merchants reported that the amount of the sum to be allowed for the hire of the vessels ought to be paid by the owners and claimants of the cargo at the following rate: \* \* \*

They were further of opinion not to allow interest on the above sum; conceiving it to be a sufficient compensation to the parties.

**THE YOUNG JACOB AND JOHANNA.**

(1 Robinson's Admiralty Reports, 18.)

**RIGHT OF BELLIGERENT TO CONFISCATE FISHING VESSELS.**

This was the case of a small fishing vessel taken on her return from the Dogger Bank to Holland.

Sir W. Scott.—In former wars, it has not been usual to make captures of these small fishing vessels; but this rule was a rule of comity only, and not of legal decision; it has prevailed from views of mutual accommodation between neighboring countries, and from tenderness to a poor and industrious order of people. In the present war there has, I presume, been sufficient reason for changing this mode of treatment; and as they are brought before me for my judgment, they must be referred to the general principles of this Court; they fall

under the character and description of the last class of cases; that is, of ships constantly and exclusively employed in the enemy's trade.

But it has been argued in distinction that vessels of this kind have no decisive character arising from destination, or from the port of their return; they come, it is said, frequently to this country, and resort indifferently to any port that will afford them a market. When a case shall occur of a vessel so destined, occasionally, to the ports of this country, it will be time enough to consider by what rule it is to be governed; but all the facts of this case point so entirely to Holland that I have no hesitation in pronouncing that it falls under the authority of the principles which I have laid down in the late class; and is therefore subject to condemnation.

It is a further satisfaction to me, in giving this judgment, to observe that the facts also bear strong marks of a false and fraudulent transaction.

#### THE PAQUETE HABANA.

(175 U. S. 677.)

#### EXEMPTION OF FISHING VESSELS FROM CAPTURE AND CONFISCATION.

Mr. Justice Gray delivered the opinion of the Court.

These are two appeals from decrees of the District Court of the United States for the Southern District of Florida, condemning two fishing vessels and their cargoes as a prize of war.

Each vessel was a fishing smack, running in and out of Havana, and regularly engaged in fishing on the coast of Cuba; sailed under the English flag; was owned by a Spanish subject of Cuban birth, living in the city



of Havana; was commanded by a subject of Spain, also residing in Havana; and her master and crew had no interest in the vessel, but were entitled to shares, amounting in all to two-thirds of her catch, the other third belonging to her owner. Her cargo consisted of fresh fish, caught by her crew from the sea, put on board as they were caught, and kept and sold alive.

- Until stopped by the blockading squadron, she had no knowledge of the existence of the war, or of any blockade. She had no arms or ammunition on board, and made no attempt to run the blockade after she knew of its existence, nor any resistance at the time of the capture.

The Paquete Habana was a sloop, 43 feet long on the keel, and of 25 tons burden, and had a crew of three Cubans, including the master, who had a fishing license from the Spanish Government, and no other commission or license. She left Havana March 25, 1898; sailed along the coast of Cuba to Cape San Antonio at the western end of the island, and there fished for twenty-five days, lying between the reefs off the cape, within the territorial waters of Spain; and then started back for Havana, with a cargo of about 40 quintals of live fish. On April 25, 1898, about two miles off Mariel, and eleven miles from Havana, she was captured by the United States gunboat Castine.

The Lola was a schooner, 51 feet long on the keel, and of 35 tons burden, and had a crew of six Cubans, including the master, and no commission or license. She left Havana April 11, 1898, and proceeded to Campeachy Sound off Yucatan, fished there eight days, and started back for Havana with a cargo of about 10,000 pounds of live fish. On April 26, 1898, near Havana, she was stopped by the United States steamship Cincinnati,

and was warned not to go into Havana, but was told that she would be allowed to land at Bahia Honda. She then changed her course, and put for Bahia Honda, but on the next morning, when near the port, was captured by the United States steamship Dolphin.

Both the fishing vessels were brought by their captors into Key West. A libel for the condemnation of each vessel and her cargo as a prize of war was there filed on April 27, 1898; a claim was interposed by her master on behalf of himself and the other members of the crew, and of her owner; evidence was taken, showing the facts above stated; and on May 30, 1898, a final decree of condemnation and sale was entered, "the Court not being satisfied that as a matter of law, without any ordinance, treaty or proclamation, fishing vessels of this class are exempt from seizure."

Each vessel was thereupon sold at auction; the Paquete Habana for the sum \$490; and the Lola for the sum of \$800. There was no other evidence in the record of the value of either vessel or of her cargo.

It has been suggested, in behalf of the United States, that this court has no jurisdiction to hear and determine these appeals, because the matter in dispute in either case does not exceed the sum or value of \$2000, and the District Judge has not certified that the adjudication involves a question of general importance.

The intention of Congress, by the act of 1891, to make the nature of the case, and not the amount in dispute, the test of the appellate jurisdiction of this court from the District and Circuit Courts, clearly appears upon examinaion of the leading provision of the act.

We are then brought to the consideration of the question whether, upon the facts appearing in these records, the fishing smacks were subject to capture by the armed

vessels of the United States during the recent war with Spain.

By an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war.

This doctrine, however, has been earnestly contested at the bar; and no complete collection of the instances illustrating it is to be found, so far as we are aware, in a single published work, although many are referred to and discussed by the writers on international law, notably in 2 Ortolan, *Regles Internationales et Diplomatie de la mer* (4th ed.) lib. 3, c. 2, pp. 51-56; in 4 Calvo, *Droit International* (5th ed.), sections 2367-2373; in De Boeck, *Propriete Privee Ennemie sous Pavillon Ennemi*, sections 191-196; and in Hall, *International Law* (4th ed.), sec. 148. It is therefore worth the while to trace the history of the rule, from the earliest accessible sources, through the increasing recognition of it, with occasional setbacks, to what we may now justly consider as its final establishment in our own country and generally throughout the civilized world.

The earliest acts of any government on the subject, mentioned in the books, either emanated from, or were approved by, a King of England.

In 1403 and 1406, Henry IV. issued orders to his admirals and other officers, entitled "Concerning Safety for Fishermen—*De Securitate pro Piscatoribus*." By an order of October 26, 1403, reciting that it was made pursuant to a treaty between himself and the King of France; and for the greater safety of the fishermen of either country, and so that they could be, and carry on

their industry, the more safely on the sea, and deal with each other in peace; and that the French King had consented that English fishermen should be treated likewise; it was ordained that French fishermen might, during the then pending season for the herring fishery, safely fish for herrings and all other fish, from the harbor of Gravelines and the island of Thanet to the mouth of the Seine and the harbor of Hautoune. And by an order of October 5, 1406, he took into his safe conduct, and under his special protection, guardianship and defence, all and singular, the fishermen of France, Flanders and Brittany, with their fishing vessels and boats, everywhere on the sea, through and within his dominions, jurisdictions and territories, in regard to their fishery, while sailing, coming and going, and, at their pleasure, freely and lawfully fishing, delaying or proceeding, and returning homeward with their catch of fish, without any molestation or hindrance whatever; and also their fish, nets, and other property and goods soever; and it was therefore ordered that such fishermen should not be interfered with, provided they should comport themselves well and properly, and should not, by color of these presents, do or attempt, anything that could prejudice the King, or his kingdom of England, or his subjects.—8 Rymer's *Foedera*, 336-451.

The treaty made October 2, 1521, between the Emperor Charles V. and Francis I. of France, through their ambassadors, recited that a great and fierce war had arisen between them, because of which there had been, both by land and by sea, frequent depredations and incursions on either side, to the grave detriment and intolerable injury of the innocent subjects of each; and that a suitable time for the herring fishery was at hand, and, by reason of the sea being beset by the enemy, the

fishermen did not dare to go out, whereby the subject of their industry, bestowed by heaven to allay the hunger of the poor, would wholly fail for the year, unless it were otherwise provided—quo fit, ut piscaturae commoditas ad pauperum levandam famem a coelesti numine concessa, cessare hoc anno omnino debeat, nisi aliter provideatur. And it was therefore agreed that the subjects of each sovereign, fishing in the sea, or exercising the calling of fishermen, could and might, until the end of next January, without incurring any attack, depredation, molestation, trouble or hindrance soever, safely and freely, everywhere in the sea, take herrings and every other kind of fish, the existing war by land and sea notwithstanding; and further, that, during the time aforesaid, no subject of either sovereign should commit, or attempt or presume to commit, any depredation, force, violence, molestation or vexation, to or upon such fishermen, or their vessels, supplies, equipments, nets and fish, or other goods soever truly appertaining to fishing. The treaty was made at Calais, then an English possession. It recites that the ambassadors of the two sovereigns met there at the earnest request of Henry VIII., and with his countenance, and in the presence of Cardinal Wolsey, his chancellor and representative. And towards the end of the treaty it is agreed that the said King and his said representative, “by whose means the treaty stands concluded, shall be conservators of the agreements therein, as if thereto by both parties elected and chosen.” 4 Dumont, *Corps Diplomatique*, pt. I, pp. 352, 353.

The herring fishery was permitted, in time of war, by French and Dutch edicts in 1536. Bynkershoek, *Quaestiones Juris Publicae*, lib. I, c. 3; I Emergion des Assurances, c. 4, sect. 9; c. 12, sect. 19, sec. 8.

France, from remote times, set the example of alleviating the evils of war in favor of all coast fishermen. In the compilation entitled *Us et Coutumes de la Mer*, published by Cleirac in 1661, and in the third part thereof, containing "Maritime or Admiralty Jurisdiction—la Jurisdiction de la Marine ou d'Admirante—as well in time of peace as in time of war," article 80 is as follows: "The admiral may in time of war accord fishing truces—*tresves pescheresses*—to the enemy and to his subjects; provided that the enemy will likewise accord them to Frenchmen." Cleirac, 544. Under this article, reference is made to articles 49 and 79, respectively, of the French ordinances concerning the Admiralty in 1543 and 1584, of which it is but a reproduction. 4 Pardessus, *Collection de Lois Maritimes*, 319; 2 Ortolan, 51. And Cleirac adds, in a note, this quotation from Froissart's *Chronicles*: "Fishermen on the sea, whatever war there were in France and England, never did harm to one another; so they are friends, and help one another at need—*Pescheurs sur mer*, quelque guerre qui soit en France et Angleterre, jamais ne se firent mal l'un a l'autre; ainçois sont amis, et s'aydent l'un a l'autre au besoin."

The same custom would seem to have prevailed in France until towards the end of the seventeenth century. For example, in 1675, Louis XIV. and the States General of Holland, by mutual agreement, granted to Dutch and French fishermen the liberty, undisturbed by their vessels of war, of fishing along the coasts of France, Holland and England. D'Hauterive et De Cussy, *Traites de Commerce*, pt. I, vol. 2, p. 278. But by the ordinances of 1681 and 1692 the practice was discontinued, because, Valin says, of the faithless conduct of the enemies of France, who, abusing the good faith with which she had

always observed the treaties, habitually carried off her fishermen, while their own fished in safety. 2 Valin sur l'Ordonnance de la Marine, (1776) 689, 690; 2 Ortolan, 52; Du Boeck, sec. 192.

The doctrine which exempts coast fishermen with their vessels and cargoes from capture as prize of war has been familiar to the United States from the time of the War of Independence.

On June 5, 1779, Louis XVI., our ally in that war, addressed a letter to his admiral, informing him that the wish he had always had of alleviating, as far as he could, the hardships of war, had directed his attention to that class of his subjects which devoted itself to the trade of fishing, and had no other means of livelihood; that he had thought that the example which he should give to his enemies, and which could have no other source than the sentiments of humanity which inspired him, would determine them to allow to fishermen the same facilities which he should consent to grant; and that he had therefore given orders to the commanders of all his ships not to disturb English fishermen, nor to arrest their vessels laden with fresh fish, even if not caught by those vessels; provided they had no offensive arms, and were not proved to have made any signals creating a suspicion of intelligence with the enemy; and the admiral was directed to communicate the King's intentions to all officers under his control. By a royal order in council of November 6, 1780, the former orders were confirmed; and the capture and ransom, by a French cruiser, of the John and Sarah, an English vessel, coming from Holland, laden with fresh fish, were pronounced to be illegal. 2 Code des Prises, (ed. 1784), 721, 901, 903.

Among the standing orders made by Sir James Mar-

riott, Judge of the English High Court of Admiralty, was one of April 11, 1780, by which it was "ordered, that all causes of prize of fishing boats or vessels taken from the enemy may be consolidated in one monition, and one sentence or interlocutory, if under fifty tons burden, and not more than six in number." Marriott's Formulary, 4. But by the statements of his successor, and of both French and English writers, it appears that England, as well as France, during the American Revolutionary War, abstained from interfering with the coast fisheries. The Young Jacob and Johanna, I. C. Rob. 20; 2 Ortolan, 53; Hall, sec. 148.

Dana, in a note to his edition of Wheaton's International Law, says: "In many treaties and decrees, fishermen catching fish as an article of food are added to the class of persons whose occupation is not to be disturbed in war." Wheaton's International Law, (8th ed.), sec. 345, note 168.

Since the United States became a nation, the only serious interruptions, so far as we are informed, of the general recognition of the exemption of coast fishing vessels from hostile capture, arose out of the mutual suspicions and recriminations of England and France during the wars of the French Revolution.

In the first years of those wars, England having authorized the capture of French fishermen, a decree of the French National Convention of October 2, 1793, directed the executive power "to protest against this conduct, theretofore without example; to reclaim the fishing boats seized; and, in case of refusal, to resort to reprisals." But in July, 1796, the Committee of Public Safety ordered the release of English fishermen seized under the former decree, "not considering them as prisoners of war." *La Nostra Signora de la Piedad*, (1801)



cited below; 2 De Cussy, *Droit Maritime*, 164, 165; I Massé, *Droit Commercial*, (2d ed.) 266, 267.

On January 24, 1798, the English Government, by express order, instructed the commanders of its ships to seize French and Dutch fishermen with their boats. 6 Martens, *Recueil des Traites*, (2d ed.) 505; 6 Schoell, *Histoire des Traites*, 119; 2 Ortolan, 53. After the promulgation of that order, Lord Stowell (then Sir William Scott) in the High Court of Admiralty of England condemned small Dutch fishing vessels as prize of war. In one case, the capture was in April, 1798, and the decree was made November 13, 1798. The *Young Jacob* and *Johanna*, 1 C. Rob. 20. In another case, the decree was made August 23, 1799. The *Noydt Gedacht*, 2 C. Rob. 137, note.

For the year 1800, the orders of the English and French governments and the correspondence between them may be found in books already referred to. 6 Martens, 503-512; 6 Schoell, 118-120; 2 Ortolan, 53, 54. The doings for that year may be summed up as follows: On March 27, 1800, the French government, unwilling to resort to reprisals, re-enacted the orders given by Louis XVI. in 1780, above mentioned, prohibiting any seizure by the French ships of English fishermen, unless armed, or proved to have made signals to the enemy. On May 30, 1880, the English government, having received notice of that action of the French government, revoked its order of January 24, 1798. But, soon afterwards, the English government complained that French fishing boats had been made into fire boats at Flushing, as well as that the French government had impressed, and had sent to Brest, to serve in its flotilla, French fishermen and their boats, even those whom the English had released on condition of their not serving; and on January 21, 1801,

summarily revoked its last order, and again put in force its order of January 24, 1798. On February 16, 1801, Napoleon Bonaparte, then First Consul, directed the French commissioner at London to return at once to France, first declaring to the English government that its conduct, "contrary to all the usages of civilized nations, and to the common law which governs them, even in time of war, gave to the existing war a character of rage and bitterness which destroyed even the relations usual in a loyal war," and "tended only to exasperate the two nations, and to put off the term of peace;" and that the French government, having always made it "a maxim to alleviate as much as possible the evils of war, could not think, on its part, of rendering wretched fishermen victims of a prolongation of hostilities, and would abstain from all reprisals."

Wheaton, in his digest of the law of Maritime Captures and Prizes, published in 1815, wrote: "It has been usual in maritime wars to exempt from capture fishing boats and their cargoes, both from views of mutual accommodation between neighboring countries, and from tenderness to a poor and industrious order of people. This custom, so honorable to the humanity of civilized nations, has fallen into disuse; and it is remarkable that both France and England mutually reproach each other with that breach of good faith which has finally abolished it." Wheaton on Captures, c. 2, sec. 18.

This statement clearly exhibits Wheaton's opinion that the custom had been a general one, as well that it ought to remain so. His assumption that it had been abolished by the differences between France and England at the close of the last century was hardly justified by the state of things when he wrote, and has not since been borne out.

During the wars of the French Empire, as both French and English writers agree, the coast fisheries were left in peace. 2 Ortolan, 54; De Boeck, sec. 193; Hall, sec. 148. De Boeck quaintly and truly adds, "and the incidents of 1800 and 1801 had no morrow—*n'eurent pas de lendemain.*"

In the war with Mexico in 1846, the United States recognized the exemption of coast fishing boats from capture. In proof of this, counsel have referred to records of the Navy Department, which this court is clearly authorized to consult upon such a question. *Jones v. United States*, 137 U. S. 202; *Underhill v. Hernandez*, 168 U. S. 250, 253.

By those records it appears that Commodore Conner, commanding the Home Squadron blockading the east coast of Mexico, on May 14, 1846, wrote a letter from the ship *Cumberland*, off Brazos Santiago, near the southern point of Texas, to Mr. Bancroft, the Secretary of the Navy, enclosing a copy of the commodore's "instructions to the commanders of the vessels of the Home Squadron, showing the principles to be observed in the blockade of Mexican ports," one of which was that "Mexican boats engaged in fishing on any part of the coast will be allowed to pursue their labors unmolested;" and that on June 10, 1846, those instructions were approved by the Navy Department, of which Mr. Bancroft was still the head, and continued to be until he was appointed Minister to England in September following. Although Commodore Conner's instructions and the Department's approval thereof do not appear in any contemporary publication of the Government, they evidently became generally known at the time, or soon after; for it is stated in several treatises on international law (beginning with Ortolan's second edition, published in

1853) that the United States in the Mexican War permitted the coast fishermen of the enemy to continue the free exercise of their industry. 2 Ortolan, (2d ed.) 49 note; (4th ed.) 55; 4 Calvo, (5th ed.) sec. 2372; De Boeck, sec. 194; Hall, (4th ed.) sec. 148.

Each vessel was of a moderate size, such as is not unusual in coast fishing smacks, and was regularly engaged in fishing on the coast of Cuba. The crew of each were few in number, had no interest in the vessel, and received, in return for their toil and enterprise, two-thirds of her catch, the other third going to her owner by way of compensation for her use. Each vessel went out from Havana to her fishing ground, and was captured when returning along the coast of Cuba. The cargo of each consisted of fresh fish, caught by her crew from the sea, and kept alive on board. Although one of the vessels extended her fishing trip across the Yucatan Channel and fished on the coast of Yucatan, we cannot doubt that each was engaged in the coast fishery, and not in a commercial adventure, within the rule of international law.

The two vessels and their cargoes were condemned by the District Court as prize of war; the vessels were sold under its decrees; and it does not appear what became of the fresh fish of which their cargoes consisted.

Upon the facts proved in either case, it is the duty of this court, sitting as the highest prize court of the United States, and administering the law of nations, to declare and adjudge that the capture was unlawful, and without probable cause; and it is therefore in each case,

Ordered, that the decree of the District Court be reversed, and the proceeds of the sale of the vessel, to-

gether with the proceeds of any sale of her cargo, be restored to the claimant, with damages and costs.

UNITED STATES *v.* SMITH.

(5 Wheaton, 153.)

DEFINITION OF PIRACY.

Story, J., delivered the opinion of the court.

The act of Congress upon which this indictment is founded provides, "that if any person or persons whatsoever, shall, upon the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders shall be brought into, or found in, the United States, every such offender or offenders shall, upon conviction thereof, etc., be punished with death."

The first point made at the bar is, whether this enactment be a constitutional exercise of the authority delegated to Congress upon the subject of piracies. The constitution declares, that Congress shall have power "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations." The argument which has been urged in behalf of the prisoner is, that Congress is bound to define, in terms, the offense of piracy, and is not at liberty to leave it to be ascertained by judicial interpretation. If the argument be well founded, it seems admitted by the counsel that it equally applies to the eighth section of the act of Congress of 1790, c. 9, which declares, that robbery and murder committed on the high seas shall be deemed piracy; and yet, notwithstanding a series of contested adjudications on this section, no doubt has hitherto been breathed of its conformity to the constitution.

In our judgment, the construction contended for proceeds upon too narrow a view of the language of the con-

stitution. The power given to Congress is not merely "to define and punish piracies;" if it were, the words "to define," would seem almost superfluous, since the power to punish piracies would be held to include the power of ascertaining and fixing the definition of the crime. And it has been very justly observed, in a celebrated commentary, that the definition of piracies might have been left, without inconvenience, to the law of nations, though a legislative definition of them is to be found in most municipal codes. The Federalist, No. 42, p. 276. But the power is also given "to define and punish felonies on the high seas, and offenses against the law of nations." The term "felonies" has been supposed, in the same work, not to have a very exact and determinate meaning in relation to offenses at the common law committed within the body of a country. However this may be, in relation to offenses on the high seas, it is necessarily somewhat indeterminate, since the term is not used in the criminal jurisprudence of the admiralty in the technical sense of the common law. See 3 Inst. 112; Hawk. P. C. c. 37; Moore, 576. Offenses, too, against the law of nations, cannot, with any accuracy, be said to be completely ascertained and defined in any public code recognized by the common consent of nations. In respect, therefore, as well to felonies on the high seas as to offenses against the law of nations, there is a peculiar fitness in giving the power to define as well as to punish; and there is not the slightest reason to doubt that this consideration had very great weight in producing the phraseology in question.

But supposing Congress were bound, in all the cases included in the clause under consideration, to define the offense, still, there is nothing which restricts it to a mere logical enumeration, in detail, of all the facts constitut-

ing the offense. Congress may as well define by using a term of a known and determinate meaning, as by an express enumeration of all the particulars included in that term. That is certain which is by necessary reference made certain. When the act of 1790 declares that any person who shall commit the crime of robbery, or murder, on the high seas shall be deemed a pirate, the crime is not less clearly ascertained than it would be by using the definitions of these terms as they are found in our treatises of common law. In fact, by such a reference, the definitions are necessarily included, as much as if they stood in the text of the act. In respect to murder, "malice aforethought" is of the essence of the offense, even if the common law definition were quoted in express terms, we should still be driven to deny that the definition was perfect, since the meaning of "malice aforethought" would remain to be gathered from the common law. There would then be no end to our difficulties, or our definition, for each would involve some terms which might still require some new explanation. Such a construction of the constitution is, therefore, wholly inadmissible. To define piracies, in the sense of the constitution, is merely to enumerate the crimes which shall constitute piracy; and this may be done either by a reference to crimes having a technical name, and determinate extent, or by enumerating the acts in detail, upon which the punishment is inflicted.

It is next to be considered, whether the crime of piracy is defined by the law of nations with reasonable certainty. What the law of nations on this subject is, may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law. There is scarcely a

writer on the law of nations, who does not allude to piracy as a crime of a settled and determinate nature; and whatever may be the diversity of definitions, in other respects, all writers concur in holding that robbery, or forcible depredations upon the sea, *animo furandi*, is piracy. The same doctrine is held by all the great writers on maritime law, in terms that admit of no reasonable doubt. The common law, too, recognizes and punishes piracy as an offense, not against its own municipal code, but as an offense against the law of nations, (which is a part of the common law) as an offense against the universal law of society, a pirate being deemed an enemy of the human race. Indeed, until the statute of 28th of Henry VIII., c. 15, piracy was punishable in England only in the admiralty, as a civil law offense; and that statute, in changing the jurisdiction, has been universally admitted not to have changed the nature of the offense. Hawk, P. C. c. 37, s. 2; 3 Inst. 112. Sir Charles Hedges, in his charge at the admiralty sessions, in the case of *Rex. v. Dawson*, 5 State Trials, declared, in emphatic terms, that, "piracy is only a sea term for robbery, piracy being a robbery committed within the jurisdiction of the admiralty." Sir Leoline Jenkins, too, on a like occasion, declared that "a robbery, when committed upon the sea, is what we call piracy," and he cited the civil law writers, in proof. And it is manifest, from the language of Sir William Blackstone, 4 Bl. Comm. 73, in his comments on piracy, that he considered the common law definition as distinguishable in no essential respect from that of the law of nations. So that, whether we advert to writers on the common law, or the maritime law, or the law of nations, we shall find that they universally treat of piracy as an offense against the law of nations, and that its true defi-



dition, by that law, is robbery upon the sea. And the general practice of all nations in punishing all persons, whether natives or foreigners, who have committed this offense against any persons whatsoever, with whom they are in amity, is a conclusive proof that the offense is supposed to depend, not upon the particular provisions of any municipal code, but upon the law of nations, both for its definition and punishment. We have, therefore, no hesitation in declaring that piracy, by the law of nations, is robbery upon the sea, and that it is sufficiently and constitutionally defined by the 5th section of the act of 1819.

Another point has been made in this case, which is, that the special verdict does not contain sufficient facts upon which the court can pronounce that the prisoner is guilty of piracy. We are of a different opinion. The special verdict finds that the prisoner is guilty of the plunder and robbery charged in the indictment; and finds certain additional facts from which it is most manifest that he and his associates were, at the time of committing the offense, freebooters upon the sea, not under the acknowledged authority, or deriving protection from the flag or commission of any government. If, under such circumstances, the offense be not piracy, it is difficult to conceive any which would more completely fit the definition.

It is to be certified to the Circuit Court, that upon the facts stated, the case is piracy, as defined by the law of nations, so as to be punishable under the act of Congress of the 3d of March, 1819.

## THE TWILLING RIGHT.

(3 Robinson's Admiralty Reports, 77.)

MEASURE OF FREIGHT UNDER A DECREE OF RESTITUTION  
WITH FREIGHT.

JUDGMENT,—Sir W. Scott.—It is agreed on all sides, that these cases must go again before the Registrar and merchants, to be reconsidered, on the objections that are made to the mode of calculating the burthen. It will, therefore, not be necessary for me to say much on that point, or to give any precise judgment upon the case at large; because if it should happen that they see occasion to make a larger allowance on that score, it is probable that the difference between the parties may no longer be very material. At the same time I will say, that I perfectly accede to the principle that has been advanced, in support of the rule, on which the Registrar and merchant have proceeded, that the charter-party is not the measure by which the captor in all case is bound, even where no fraud is imputed to the contract itself. When by the events of war, navigation is rendered so hazardous as to raise the price of freight to an extraordinary height, captors are not necessarily bound to that inflated rate of freight. When no such circumstances exists, when a ship is carrying on an ordinary trade, the charter-party is undoubtedly the rule of valuation, unless impeached; the captor puts himself in the place of the owner of the cargo, and takes with that specific lien upon it. But a very different rule is to be applied, when the trade is subjected to extraordinary risk and hazard, from its connection with the events of war, and the redoubled activity and success of the beligerent cruisers. It appears to me, that this is a case

of that kind; and it may not be improper to advert a little to the nature of the commerce in which this ship was engaged, in the performance of a contract, which has been deemed illegal, both in this Court and in the Court of Appeal. In such a service, it could not but have been considered as an adventure of some hazard, to send ships on a new and experimental trade, which was, in its effect, to put Mr. De Coninck into the place of the Dutch East-India Company. The owners would naturally look for their indemnification in an advanced freight, in terms, which might not be in any degree unfair, or unreasonable between the parties, considered as the premiums of a voyage eminently hazardous on account of its illegality, as against the rights of this country. Mr. De Coninck also might look for his indemnification to the Dutch East-India Company, in the price, at which he had obtained this contract, in consequence of their distress. Considerations of this nature might render it a real and fair contract between the parties; but the freight, as a burden upon the English captor, does not come loaded with all these considerations, none of which apply to him. The cases of the corn ships do, I think, bear a fair analogy to this case. I remember well, that in those cases a paper was thrown on this table, stating the price not to be unreasonable, under the opinion of some of the most respectable merchants of this town, that such would be the price paid by the French consignee under the then distressed state of the French market. But the Court said, that they mistook the principle, and were deciding a question of law—viz., that the captor was in all cases bound to stand to the chartered price, if not impeached by the real prices of the market. The principle of that decision is not, in my opinion, improperly pressed into the present case; and it does sufficiently

confirm the general position, that captors are not in all cases bound by the terms of the charter-party, though they may not be colorable, or liable to any imputation of fraud. At the same time, the Registrar and merchants will not depart from the charter-party without good cause, and without looking on all sides for information. Something has been thrown out, in argument, as if they had looked no farther than to the two particular cases, in which a freight of ninety-five dollars per ton has appeared to have been the freight stipulated for a similar voyage in Copenhagen, about the same time. I cannot suppose that to be the case: On the contrary, knowing their experience in matters of trade, their opportunities of information, and the strict sense which they entertain of their duty to the Court, and to the public, I am to suppose, that they look abroad on all sides, to obtain all possible information that may enable them to do justice between the parties. I consider their report, not as an opinion formed only with a reference to those two cases of Mr. De Coninck, but as the result of deliberate inquiries, by which they were led to consider this allowance as an adequate freight for such a voyage, under all the circumstances that were fairly applicable to it. Affirming the general principle, I shall refer the report back for their consideration.

## CHAPTER VII.

### ENEMY CHARACTER.

We have already seen that although war is a contest between states, not individuals, it does nevertheless infect the citizens of the warring states with a certain character which they did not have during peace. They undoubtedly stand in a different relation to the other belligerent state and its citizens than before the beginning of the war. So far as concerns those who are in the opposing forces, whether on sea or land, the matter is too clear to need discussion. Unquestionably their acts are such as to place them in a changed relation toward each other. To this changed relation the term enemy character is applied. But the use of the term is not confined to the active forces of the opposing states; it extends to other persons and to property. This extension, we think, warrants a brief discussion.

We have already seen that enemy character extends to the person of citizens of a state who are not engaged in active hostilities, i. e., to non-combatants; that while the consequences of this character are by no means so great to those as they once were, there are still consequences of more or less importance arising out of this character. We have also seen that important consequences result from the fact of enemy character which adheres to the property of citizens of the enemy state.

In addition to the above classes of persons and property, the following are, under certain circumstances, infected with enemy character: aliens resident within the enemy's territory or having a house of trade within enemy's territory; property of neutrals within the enemy's

Enemy character not confined to opposing forces.

It extends to non-combatants and to property.

Classes of persons and property infected with enemy character.

territory; property put to certain uses or dealt with in certain ways.

**Residents of  
territory under  
military occu-  
pation.**

Persons residing within the territory of the enemy become, by reason of that fact, identified to such an extent with the enemy that in case the district wherein they reside is seized they are subjected to the same burdens as the subjects of the enemy. If contributions or requisitions are levied they fall upon them as upon the subjects of the enemy. Thus the rule that all subjects of neutral states are neutrals is modified to some extent by the fact of residence. When residence ripens into domicile the effects become still more marked because of the stronger tie between a state and its domiciled aliens than between it and mere sojourners. The rules determining domicile have already been considered. It may be well to call attention to the fact that as enemy character attaches to a neutral only by virtue of his peculiar relation to the enemy, as soon as that relation ends the character and its consequences end. So that if at the beginning or during the progress of a war, one whose enemy character results merely from domicile quits the enemy's country with a bona fide intention not to return, his enemy character ceases. As it rested entirely upon residence and intention, when these no longer exist it is but natural that the character due to them should cease. This is illustrated by the case of Mr. Johnson, an American citizen, who by residing in England from 1783 to 1797 had acquired a domicile in that country, but in the latter year he resolved to return to America and did return. Upon the capture of a ship of his because of hostilities then going on between England and France it was held that as "the national character of Mr. Johnson as a British merchant was founded on residence only, as it was acquired by residence, and rested on that

circumstance alone, he was in the act of resuming his original character, and is to be considered an American, from the moment he turns his back on the country where he has resided." (The Indian Chief, 3 Robinson 12.)

The same conclusion is reached by Chief Justice Marshall, who says: "I entirely concur in so much of the opinion delivered in this case, as attaches a hostile character to the property of an American citizen continuing, after the declaration of war, to reside and trade in the country of the enemy. But from so much of that opinion as subjects to confiscation the property of a citizen shipped before a knowledge of the war, and which disallows the defense founded on the intention to change his domicile and to return to the United States, manifested in a sufficient manner, and within a reasonable time after knowledge of the war, although it be subsequent to the capture, I feel myself compelled to dissent." (8 Cranch 288.)

View of Justice  
Marshall.

If a neutral has a house of trade within the enemy's territory or is partner in such a house, this is considered as being of sufficient advantage to the enemy that, so far as his relation to the goods is concerned, enemy character is attributed to him and the goods may be seized as enemy goods. Upon this point Justice Story says: "It has long been decided, in the courts of admiralty, that the property of a house of trade, established in the enemy's country, is condemnable, as prize, whatever may be the domicile of the partners. The trade of such a house is deemed essentially a hostile trade, and the property engaged in it is, therefore, treated as enemy's property, notwithstanding the neutral domicile of any of the company. The rule, then, being inflexibly settled, we do not now feel at liberty to depart from it, whatever doubt might have been entertained if

Houses of trade.

the case were entirely new." (The *Freundschaft*, 4 Wheaton, 105.) This rule will probably continue in force until all private property at sea, barring contraband, is exempt from capture.

Land of neutral  
within enemy  
territory.

The land of a neutral which is within the jurisdiction of the enemy partakes as much of enemy character as land owned by the subjects of the enemy, for in both cases the produce of the land goes to increase the resources of the enemy. Such produce is said to partake of the enemy character by virtue of its origin. The neutral owner cannot impress his neutral character upon the soil within the limits of enemy territory, for the reason that the enemy may by taxes take the entire produce of the soil regardless of the character of the owner. This holds true whether the land is within the original limits of the enemy state or within territory held by it in military occupation. Even the subjects of the state from which it is taken are for certain purposes treated as enemies, e. g., goods shipped by them may be captured as enemy property and may be made to pay the custom's duties if shipped into the ports of a state from which the territory has been wrested. On this Sir William Scott says: "It cannot be doubted that there are transactions so radically and fundamentally national as to impress the national character, independent of peace or war, and the local residence of the parties. The produce of a man's own plantation in the colony of the enemy, though shipped in time of peace, is liable to be considered as property of the enemy, by reason that the proprietor has incorporated himself with the permanent interests of the nation as holder of the soil and is to be taken as a part of that country, in that particular transaction, independent of his personal residence or occupation." And with greater clearness Jus-



tice Marshall states the rule, in 9 Cranch 195, as follows: "Some doubt has been suggested whether Santa Cruz, while in the possession of Great Britain, could properly be considered as a British island. But, for this doubt there can be no foundation. Although acquisitions made during war are not considered as permanent until confirmed by treaty, yet to every commercial and belligerent purpose they are considered as part of the domain of the conqueror, so long as he retains possession and government of them. The island of Santa Cruz, after its capitulation, remained a British island until it was returned to Denmark."

It is not always easy to say whether property in places having an ambiguous sovereignty has or has not an enemy character. For instance, there are countries over which Turkey still has a nominal sovereignty or suzerainty, yet, if Turkey were to get into war with another state, it is very doubtful if that other state would consider these countries as enemies. Numerous disputes of this nature have arisen. At one time Trieste belonged nominally to the German Confederation and actually to Austria, so that when Austria and Sardinia were at war it was a disputed question whether the port of Trieste was neutral or enemy territory. In all disputes of this kind it would seem that the fact of control rather than the theory of sovereignty should be the determining factor. And this rule is almost equally true whether we consider it from the standpoint of peaceful or belligerent purposes; but whatever quibbles there may be with reference to the former, it certainly holds good with reference to the latter.

But not only by its origin and location may property acquire enemy character, such character may be acquired by the use to which property is put or by the

Places under  
ambiguous  
sovereignty.

Enemy character acquired by use to which property of neutral is put.

dealings concerning it. The ship of a neutral if manned by an enemy captain and crew and engaged in enemy commerce would undoubtedly acquire an enemy character, so that if captured it would be condemned and confiscated as enemy property. Likewise, neutral goods when placed upon a warship of the enemy take on the enemy character, but the case is not so clear where they are placed upon an armed merchantman of the enemy. The American rule which is opposite to the British is laid down by Chief Justice Marshall in his opinion in the case of *The Nereide* (9 Cranch 388). After reviewing the facts and evidence, he says: "That a neutral may lawfully put his goods on board a belligerent ship for conveyance on the ocean is universally recognized as the original rule of the law of nations. It is deemed of much importance that the rule is universally laid down in terms which comprehend an armed as well as an unarmed vessel; and that armed vessels have never been excepted from it. In point of fact, it is believed that a belligerent merchant vessel rarely sails unarmed, so that this exception from the rule would be greater than the rule itself. At all events the number of those who are armed and who sail under convoy is too great not to have attracted the attention of writers on public law. The antiquity of the rule is certainly not unworthy of consideration. It is to be traced back to the time when almost every merchantman was in a condition for self-defense, and the implements of war were so light and so cheap, that scarcely any would sail without them. A belligerent has a perfect right to arm in his own defense; and a neutral has a perfect right to transport his goods in a belligerent vessel. The neutral has no control over the belligerent right to arm—ought he to be accountable for the exercise of it?" In his strong dissent-

ing opinion in this case Justice Story states what seems to be the better law, viz., the belligerent has the right to search merchant vessels so as to see whether or not they have on board contraband of war and that as the neutral has no right to resist this with force it has no right to avail itself of the force of another for the purpose of resisting it.

The property of an enemy is not divested of its enemy character by a transfer to a neutral during war or in contemplation of war. This rule is laid down with greater strictness by France than by most other countries. There is a strong temptation to transfer merchant vessels to a neutral as soon as war breaks out or seems certain to break out. In this case the French law requires that the sale in order to change the character of the vessel from enemy to neutral, must be proved by valid and authentic instruments made before the buyers could have knowledge of the outbreak of war, and the transfer must also have been registered by a public officer. In the United States and England the right to make a bona fide transfer of a vessel from an enemy to a neutral is recognized, but the transfer is invalidated by any express or implied agreement that the transferor is to retain any interest in the vessel or its profits or to be entitled to a re-transfer of it at the close of hostilities. Transfers during peace being *prima facie* valid, if a complete transfer is made at any time, before the actual outbreak of war, such transfer is good, unless the circumstances surrounding the case are such as to show that the vendor and purchaser entered into the contract in contemplation of war.

Transfer of  
enemy property  
during war.

The transfer by the enemy of his goods that are in transit upon the ocean is invalid as against a belligerent unless the transfer is so complete that the transferee

Transfer of  
enemy goods in  
transit on the  
ocean.

has actually taken possession of the goods. The reason for this is to remove the very strong temptation to make fraudulent transfers to a neutral in order to disguise the character of the goods and protect them from capture. The rule, and the reason for it, is stated very clearly by Sir William Scott in the case of the *Vrow Margaretha* (1 Robinson, 336): "That a transfer of the bill of lading, with a contract of sale accompanying it, may transfer the property in the ordinary course of things, so as effectually to bind the parties, and all others, cannot well be doubted. When war intervenes another rule is set up by the Courts of Admiralty, which interferes with the ordinary practice. In a state of war, existing or imminent, it is held that the property shall be deemed to continue as it was at the time of shipment till the actual delivery; this arises out of the state of war, which gives the belligerent the right to stop the goods of his enemy. If such a rule did not exist all goods shipped in the enemy's country would be protected by transfers which it would be impossible to detect. It is on that principle held, I believe, as a general rule, that property cannot be converted in transit; and in that sense I recognize it as the rule of this Court." The rule as here laid down accords with that adhered to by the United States.

Special agree-  
ments as to  
goods shipped to  
enemy's coun-  
try

In shipping goods to any enemy's country during war, the general rule that the shipper delivers the goods to the master of the vessel as agent of the consignee so that they at once become enemy goods cannot be departed from by special agreement as it can during peace. If such special agreements were allowed during war the door to fraud would at once be opened and nearly all goods shipped to the enemy would be protected by the neutrality of the shipper. This rule and the preceding

one have lost much of their importance since the adoption of the rule by the Paris Conference exempting enemy goods on neutral ships from seizure.

THE VENUS.

(8 Cranch, 253.)

THE ACQUISITION AND CONSEQUENCES OF ENEMY CHARACTER DUE TO DOMICILE.

The great question involved in this, and many other of the prize cases which have been argued is, whether the property of these claimants who were settled in Great Britain, and engaged in the commerce of that country, shipped before they had a knowledge of the war, but which was captured, after the declaration of war, by an American cruiser, ought to be condemned as lawful prize. It is contended by the captors that as these claimants had gained a domicile in Great Britain, and continued to enjoy it up to the time when war was declared, and when these captures were made, they must be considered as British subjects, in reference to this property, and, consequently, that it may legally be seized as prize of war, in like manner as if it had belonged to real British subjects. But, if not so, it is then insisted that these claimants having, after their naturalization in the United States, returned to Great Britain, the country of their birth, and there resettled themselves, they became reintegrated British subjects, and ought to be considered by this Court in the same light as if they had never emigrated. On the other side it is argued that American citizens settled in the country of the enemy, as these persons were, at the time war was declared, entitled to a reasonable time to elect, after they knew of the war, to remain there, or to return to the

United States; and that, until such an election was, bona fide made, the Courts of this country are bound to consider them as American citizens, and their property shipped before they had an opportunity to make this election, as being protected against American capture.

There being no dispute as to the facts upon which the domicile of these claimants is asserted, the questions of law alone remain to be considered. They are two. First, By what means, and to what extent, a national character may be impressed upon a person, different from that which permanent allegiance gives him? And secondly, What are the legal consequences to which this acquired character may expose him, in the event of the war taking place between the country of his residence and that of his birth, or in which he had been naturalized?

1. The writers upon the law of nations distinguish between a temporary residence in a foreign country, for a special purpose, and a residence accompanied with an intention to make it a permanent place of abode. The latter is styled by Vattel, domicile, which he defines to be "a habitation fixed in any place, with an intention of always staying there." Such a person, says this author, becomes a member of the new society, at least as a permanent inhabitant, and is a kind of citizen of an inferior order from the native citizens; but, is nevertheless, united and subject to the society, without participating in all its advantages. This right of domicile, he continues, is not established, unless the person makes sufficiently known his intention of fixing there, either tacitly or by an express declaration. Vatt, pp. 92, 93. Grotius nowhere uses the word domicile, but he also distinguishes between those who stay in a foreign country by the necessity of their affairs, or from any other temporary cause, and those who reside there from a

permanent cause. The former he denominates strangers, and the latter, subjects; and it will presently be seen, by a reference to the same author, what different consequences these two characters draw after them.

The doctrine of the prize courts, as well as of the Courts of common law, in England, which, it was hinted, if not asserted, in argument, had no authority of universal law to stand upon, is the same with what is stated by the above writers; except that it is less general, and confines the consequences resulting from the acquired character to the property of those persons engaged in the commerce of the country in which they reside.

If it is decided by those Courts, that whilst an Englishman or a neutral, resides in a hostile country, he is a subject of that country, and is to be considered (even by his own native country, in the former case) as having a hostile character impressed upon him.

2. The question is, what are the consequences to which this acquired domicile may legally expose the person entitled to it, in the event of war taking place between the government under which he resides and that to which he owes a permanent allegiance? A neutral in his situation, if he should engage in open hostilities with the other belligerent, would be considered and treated as an enemy. A citizen of the other belligerent could not be so considered because he could not, by any act of hostility, render himself, strictly speaking, an enemy, contrary to his permanent allegiance. But although he cannot be considered an enemy, in the strict sense of the word, yet he is deemed such, with reference to the seizure of so much of his property concerned in the trade of the enemy, as is connected with his residence. It is found adhering to the enemy. He is himself adhering to the enemy, although not criminally so, unless he

engages in acts of hostility against his native country, or, probably, refuses, when required by his country, to return. The same rule, as to property engaged in the commerce of the enemy, applies to neutrals, and for the same reason. The converse of this rule inevitably applies to the subject of a belligerent state domiciled in a neutral country; he is deemed a neutral by both belligerents, with reference to the trade which he carries on with the adverse belligerent, and with all the rest of the world.

#### THE PHOENIX.

(5 Robinson's Admiralty Reports, 85.)

**PRODUCE OF ENEMY SOIL, THOUGH OWNED BY A NEUTRAL,  
TAKES ON ENEMY CHARACTER.**

This was a case of a claim, given on behalf of persons in Germany, for property taken on a voyage from Surinam to Holland, and described to be the produce of their estates in Surinam.

#### Judgment.

Sir W. Scott.—If the claimants had averred, that they made their establishment at Surinam during the time whilst the colony was under British possession, the question would have arisen whether the terms of the Treaty, which are very general, and not confined to British settlements only, should be construed to apply to the property of all persons making their establishment there during that period. It is not averred, that the claimants had become possessed of these plantations during that time. They only say, that the plantations had fallen to them by descent and devolution of the estate of a person in Holland. Certainly, nothing can be more decided, and fixed as the principle of this Court, and of the Supreme Court, upon very solemn arguments there than



that the possession of the soil does impress upon the owner the character of the country, as far as the produce of that plantation is concerned, in its transportation to another country, whatever the local residence of the owner may be. This has been so repeatedly decided both in this and in the Supreme Court, that it is no longer open to discussion. No question can be made upon the point of law at this day. In the present case the estates are described to have been acquired by descent; and as such they are by no means marked out as entitled to any favorable distinction. If they had been a late acquisition, there might have been room for the supposition that they had been acquired whilst the place was in British possession, and that the owner had been induced, by that circumstance, to form an establishment there, under the faith and protection of the British Government. Having fallen by descent on these persons from their ancestors in Holland, these plantations must be considered to carry with them the disadvantages, as well as the advantages, of the Dutch character. Nothing is averred respecting the time of possession, and therefore the question in the treaty cannot arise. As the produce of the claimant's own plantation in the colony of the enemy, this property must fall under the general law, and be pronounced subject to condemnation.

## CHAPTER VIII.

### INTERCOURSE DURING WAR.

**Necessity for modification of rule of non-intercourse.** We have already seen that with the beginning of war intercourse between the belligerents is cut off. The appeal to force puts an end to all diplomatic and commercial relations between the parties. But this strict rule is departed from partly upon the ground of necessity and partly upon the ground of convenience. Were it not, war would degenerate into carnage and peace would result only from extermination of the opposing force. It is therefore fitting that we inquire by what authority the rule may be suspended, the purposes for which it may be suspended, how a suspension is brought about and how such agreements are interpreted.

**Authority to suspend the rule.** The authority to suspend the rule depends upon whether such suspension is general or special. If general, it must be by the highest authority in the state. In the United States, the President, by virtue of his position as commander-in-chief of the army and navy, has the authority to agree to a general suspension of the rule. If the suspension is confined to a small area, i. e. is special, the highest commanding officer in that district has authority to agree to it for certain purposes. Thus any commander may grant passports or safe-conducts to subjects of the enemy which will furnish them protection within the area under his control.

**Purposes for which it may be suspended.** The purposes for which the rule of non-intercourse is suspended are either for reasons of humanity or for commercial purposes. Under the first of these would be included a suspension of arms for the purpose of burying the dead and removing the wounded; receiving flags

of truce, which facilitate negotiations looking to the avoidance of useless slaughter; cartels, truces and capitulations, which result from these negotiations. Under the second head we have licenses to trade.

A suspension of arms is the term used to designate a temporary suspension of hostilities by agreement between the opposing forces. This is intended to be of short duration and the most common purpose for which it is agreed upon is to enable the contending parties to care for their wounded and to bury their dead. The granting of such a suspension is obligatory upon neither side, but, unless there are strong strategic reasons for refusing, it has become customary between civilized states to grant such a request when made.

**Suspension of arms.**

A flag of truce is a white flag used by either side as a signal that it wishes to confer with the other. The usual custom is for the bearer of the flag to approach the enemy's lines accompanied by a trumpeter, bugler, or drummer, and if need be an interpreter. It is obligatory in civilized warfare not to fire upon any one under a flag of truce, unless either he has been warned that no conference is desired or there is overwhelming reason for believing that he is not acting in good faith. The Conference at The Hague made the following provisions concerning flags of truce:

**Flags of truce.**

Art. 32. An individual is considered as bearing a flag of truce who is authorized by one of the belligerents to enter into communication with the other, and who carries a white flag. He has a right to inviolability, as well as the trumpeter, bugler, or drummer who may accompany him.

Art. 33. The chief to whom a flag of truce is sent is not obliged to receive it in all circumstances. He can take all steps necessary to prevent the envoy taking ad-

vantage of his mission to obtain information. In case of abuse he has the right to detain the envoy temporarily.

Art. 34. The envoy loses his rights of inviolability if it is proved beyond doubt that he has taken advantage of his privileged position to provoke or commit an act of treachery.

**Cartels.**

Cartels are agreements entered into during war, or sometimes in anticipation of it, for the purpose of regulating the formalities to be observed in the reception of flags of truce, the exchange of prisoners, and the communication between belligerents by post, telephone, telegraph, etc. Cartel ships are ships used for the purpose of carrying prisoners between places agreed upon in the terms of exchange. While used for this purpose they are not subject to capture, but if they take advantage of their privileges for the purpose of carrying on commerce they lose their character of inviolability and become subject to capture.

**Truce or armistice.**

If there is a suspension of hostilities for a considerable time but not legally intended as a permanent peace, we have a truce or armistice. This may be either general or special. Whatever deception may be permissible during hostilities, good faith is always to be observed during a truce. Apart from agreements to the contrary, anything may be done within the district embraced which could have been done without interruption from the enemy during the continuance of hostilities. Thus, supplies and reinforcements may be brought up, if the road by which they are brought was not commanded by the enemy's fire during hostilities. So also, fortifications may be constructed or strengthened, if the work could not have been interrupted by the enemy's fire during hostilities.

A question which has occasioned considerable dispute is whether or not a besieged town may, apart from agreement, bring in as much provisions as are being consumed during the continuance of the truce, provided they could not have been brought in during hostilities. Those who answer the question in the affirmative base their conclusion upon the grounds that the place should not be left in a worse condition as a result of the armistice. Those who answer it in the negative argue that as starvation is one of the permissible ways for reducing a besieged town, the besieged has no right to insist upon its interruption by reason of an armistice for which he himself has asked, and it is almost invariable that the armistice is asked for by the besieged and not by the besieger. As the consumption of provisions is something which the besieged can readily foresee it would seem that he should take this into account when he asks for an armistice and unless he can secure by agreement the right to revictual he does not have the right. During the siege of Paris, Prussia refused the request of the neutral powers for a revictualing of the city to the extent of what would be consumed during the armistice.

Provisioning  
besieged places  
during truce.

The terms of a truce are to be interpreted strictly, as are all agreements for a suspension of the rule of non-intercourse. Any material deviation from the main terms under which a truce is granted may be considered a sufficient reason for terminating the truce. Thus, if either party is making use of the armistice for the purpose of strengthening their position rather than for the purpose for which it was reasonably intended, the other may consider the truce as terminated and recommence hostilities.

Interpretations  
of terms.

The time when a truce begins is usually stated in the

**When a truce begins and ends.**

agreement. If not, it is binding upon the parties as soon as the agreement is reached, and upon private individuals affected by it, as soon as they receive knowledge of it. If the area affected is large, provision is made for its going into effect at different times in different places. The need for a provision of this sort is by no means as great as it once was. If there is a time mentioned for the ending of the truce, it ends at that time without any notification. But if either party wishes to bring it to an end sooner, fairness demands that he give the other reasonable notice. What is reasonable notice depends upon the circumstances. If the termination is brought about by gross violations of the terms of the truce, the notice may be very short and in extreme cases may take the form of "a whiff of grape."

**Provisions of  
The Hague  
Conference.**

The Conference at The Hague agreed upon the following provisions for the regulation of armistices.

Art. 36. An armistice suspends military operations by mutual agreement between the belligerent parties. If its duration is not fixed, the belligerent parties can resume operations at any time, provided always the enemy is warned within the time agreed upon, in accordance with the terms of the armistice.

Art. 37. An armistice may be general or local. The first suspends all military operations of the belligerent states; the second only those between certain fractions of the belligerent armies, and in a fixed radius.

Art. 38. An armistice must be notified officially, and in good time, to the competent authorities and the troops. Hostilities are suspended immediately after the notification, or on a fixed date.

Art. 39. It is for the contracting parties to settle in the terms of the armistice what communications may

be held, in the theatre of war, with the population and with each other.

Art. 40. Any serious violation of the armistice by one of the parties gives the other party the right to denounce it, and even, in case of urgency, to recommence hostilities at once.

Art. 41. A violation of the terms of the armistice by private individuals, acting on their own initiative, only confers the right of demanding the punishment of the offenders, and, if necessary, indemnity for the losses sustained.

Capitulations is the term applied to the agreement of a military or naval force or of a fortified place to surrender upon conditions. It was formerly an almost invariable rule to insert in capitulations a promise that the lives of those who had surrendered would be spared, but this is no longer necessary as the victor is under both legal and moral obligation to do that much without any agreement. The capitulations may of course contain any provisions to which the parties agree and if not contrary to law, these conditions will be binding. But a most common condition is that the conquered shall be granted "all the honors of war," this means that they will be allowed to march out carrying their arms, with colors flying and drums beating. A noteworthy example of the granting of far more generous terms than the vanquished could in reason have demanded is to be found in the terms given by Grant to Lee's army. Also a very recent example is furnished by the capitulations of Port Arthur. Undoubtedly the Japanese would have been warranted, had they chose to exercise their right, in holding the Russian officers as well as the privates prisoners of war.

As to the authority to enter into capitulations, the

Authority to  
enter into  
capitulations.

general rule is well settled that it must be the highest officer in command in the place where the capitulation is entered into. But as the highest officer in command may be, as Sampson at the naval battle off Santiago, theoretically present but actually absent, disputes sometimes arise. Perhaps the most celebrated dispute along this line is that concerning the capitulation of El Arish. In this case, orders had been sent by the British government, in December, 1799, to Lord Keith, the commander-in-chief of the British naval forces in the Mediterranean not to grant to the French troops in Egypt any terms more favorable than a surrender as prisoners of war. This order was communicated on February 22, 1800, to Sir Sidney Smith, the British Admiral operating in Egyptian waters. In the meantime he had accepted the capitulation of the French General, Kleber, according to the terms of which the French troops were to be permitted to go home and to take with them their baggage and other property. As this capitulation had been entered into by Smith without the consent of his superior officer, Lord Keith, the British government refused at first to be bound by it, yet in order to avoid the imputation of bad faith finally consented to it. But by this time the French had gained a decisive victory at Heliopolis, and refused to be bound by the capitulation, as they were warranted in doing because of the changed conditions. Such an unfortunate combination of facts could hardly occur in these days of cables and wireless telegraphy.

El Arish.

Violation of  
instructions.

An officer having authority to enter into capitulations may exceed his authority by agreeing to terms which are at variance with his instructions, or by inserting conditions of a political rather than a military nature, e. g., when General Sherman accepted the capitulation



of General Johnston upon condition that if the Confederate army would immediately disband and place their arms in the state arsenals, the Federal government would recognize those state governments which would again submit to Federal authority and would guarantee the civil and political rights of their people. Such a capitulation is merely a sponsion, in so far as it is in excess of the powers of the commander, and must be ratified by his government before it becomes binding. Other celebrated examples of sponsions are the compact made at the Caudine Forks by the Roman Consuls with the Samnites and that at Closter Seven between the Duke of Cumberland and Marshal Richelieu. In both these cases their governments refused to ratify the agreements, and in the former case the consuls were delivered over to the Samnites and hostilities resumed by the Romans. The ground for such repudiation of agreements is that the other party had an opportunity to know that the agent was exceeding his authority and hence that ratification was necessary before the agreement was binding.

Licenses to trade are permissions to carry on commercial intercourse which is prohibited by the rules of war. These also may be either general or special. The former are granted only by the head of the state and include either all of the citizens of the state granting them or all neutral or enemy citizens to trade in particular articles or districts. The latter are usually granted by the head of the state, but may be granted by a commander within the territory under his control, they are permissions to particular individuals to do the trading described in them and are not transferable, unless made so by express words. Both alike confer upon the holder the right to sue and be sued in the courts of the grant-

Licenses to  
trade.

or and to enter into such contractual relations as are necessary to carry out the powers granted. It is not every trifling deviation from the terms of a license that will forfeit it, yet they are construed rather strictly and any material violation of terms, as the use of a ship of one nationality where the license provides only for the use of ships of another nationality, will annul the license. Misrepresentation in the securing of a license will also annul it. If a course is prescribed in the license this course must be followed, unless it must be deviated from for some unavoidable cause, as stress of weather.

Licenses to trade were used very largely during the Napoleonic wars. But now that colonial trade has ceased to be a monopoly, and owing to the changes wrought by the Conference of Paris, there is now little need for such licenses. As the old rules will in all probability never be reverted to, licenses of that sort may fairly be said to be almost obsolete.

#### THE SEA LION.

(5 Wallace, 630.)

#### AUTHORITY TO ISSUE LICENSES TO TRADE.

Mr. Justice Swayne delivered the opinion of the court.

The vessel and cargo were captured and condemned as prize of war. The appellants seek to reverse the decree upon the ground that both were protected by a license. The validity and effect of the alleged license is the main question to be considered.

Brott and Davis gave their affidavit *in preparatorio*. They insist upon the license, and allege that it was their intention to cause the vessel and cargo to be taken to New Orleans. They aver that they are loyal citizens, and that no enemy of the United States had any interest

in the vessel or cargo. The affidavit is very full as to the procuring and transmission of the alleged license, and as to the loading of the vessel at Mobile by their agents; but is wholly silent as to who are the owners, and does not allege the whole or any part of the ownership to be in themselves. Under the circumstances, this omission can hardly be deemed accidental. It has very much the appearance of the caution of a special plea. Netto and Yocum were also examined *in preparatorio*.

They repeat their belief as to the ownership, except that Netto states the turpentine to have belonged to himself and the crew. Netto also states, that after they had passed Fort Morgan, Yocum told him that New Orleans was their destination, and that he would have obeyed Yocum's order to take the vessel there. Yocum testifies that he was only supercargo, and that he was to receive \$500 for his services, and that he had no interest in the property. He said further, that from what he had heard Worne say in Mobile, his understanding was, that the vessel and cargo belonged to Brott, Davis & Shons, and Oliver & Worne. His instructions were to proceed to the mouth of the Mississippi—thence to communicate with Brott, Davis & Shons, and to await orders from them. Hubbel, one of the passengers, in his examination *in preparatorio*, says that the clearance was taken for Havana as a blind to enable the vessel to get away. Yocum told him at Mobile that she was going to New Orleans. As evidence of Yocum's intention to take her to the blockading fleet, he says, that when she started the wind was so low that she could not make more than two miles an hour, and that hence it was difficult to prevail on the pilot to take her out.

In regard to the important fact last mentioned the captain and supercargo are wholly silent.

In the light of this testimony, it is difficult to resist the conclusion that the vessel left Mobile, with alternative purposes; one, if possible to evade the blockading fleet and make Havana; the other, if intercepted and seized, to set up the license and insist upon the pretext, that she was proceeding, under its authority, in good faith to New Orleans. As we shall not place our judgment upon this ground, it is unnecessary further to pursue the subject.

The license relied upon is as follows:

Custom House, New Orleans,  
Collector's Office, February 16, 1863.

The United States military and other authorities at New Orleans permit cotton to be received here from beyond the United States military lines, and such cotton is exempt from seizure or confiscation. An order is in my hands from Major-General Banks approving and directing this policy. The only condition imposed is that cotton or other produce must not be bought with specie.

All cotton or other produce brought hither from the Confederate lines by Brott, Davis & Shons will not be interfered with in any manner, and they can ship it direct to any foreign or domestic port.

GEORGE S. DENNISON.

Special Agent of the Treas. Dep't and Acting Collector  
of Customs.

Approved. D. G. FARRAGUT, Rear Admiral.

The effect of this paper depends upon the authority under which it was issued. The fifth section of the act of July 13th, 1861, authorized the President to proclaim any state or part of a state in a condition of insurrection, and it declared, that thereupon all commercial intercourse between that territory and the citizens of the

rest of the United States, should cease and be unlawful, so long as the condition of hostility should continue, and that all goods and merchandise coming from such territory into other parts of the United States, and all proceeding to such territory by land or water, and the vessel or vehicle conveying them, or conveying persons to or from such territory, should be forfeited to the United States: "*Provided, however, That the President may, in his discretion license and permit commercial intercourse with any such part of said state or section, the inhabitants of which are so declared in a state of insurrection, in such articles, and for such time, and by such persons, as he, in his discretion, may think most conducive to the public interest; and such intercourse, so far as by him licensed, shall be conducted and carried on only in pursuance of rules and regulations prescribed by the Secretary of the Treasury.*"

There is no other statutory provision bearing upon the subject, material to be considered.

On the 16th day of August, 1861, the President issued his proclamation declaring the inhabitants of the rebel states, including Alabama, to be in a state of insurrection.

On the 28th of the same month the Secretary of the Treasury, pursuant to the provisions referred to, issued a series of regulations upon the subject of commercial intercourse with those states.

These regulations continued in force until the 31st of March, 1863, when a new series were issued by the same authority. The former were in force when the alleged license bears date; the latter when the vessel and cargo left Mobile and when they were captured. It is unnecessary to analyze them. It is sufficient to remark, that they contain nothing which affords the slightest pretext

for issuing such a paper. It is in conflict with the rules and requirements contained in both of them. It finds no warrant in the statute. The statute prescribes that the President shall license the trade. The only function of the secretary was to establish the rules by which it should be regulated, when thus permitted. The order of General Banks is not produced. If it were as comprehensive as the special agent assumed it to be, it covered shipments to New Orleans from Wilmington, Charleston, and all other points in the rebel states. It embraced merchandise, coming alike from places within, and places beyond his military lines. With respect to the latter it was clearly void. The President only could grant such a license. Mobile then was in possession of the enemy. The vessel and cargo bore the stamp of the enemy property. The paper relied upon was a nullity, and gave them no protection. They were as much liable to capture and condemnation as any other vessel or cargo, leaving a blockaded port and coming within reach of a blockading vessel.

The decree below was rightly rendered, and it is Affirmed.

#### THE HOOP.

(1 Robinson's Admiralty Reports, 165.)

GOODS OF BELLIGERENT SUBJECT SHIPPED TO ENEMY CONFISCABLE, UNLESS SHIPPERS POSSESS LICENSE TO TRADE WITH ENEMY.

Sir W. Scott—This is the case of a ship laden with flax, madder, geneva and cheese, and bound from Rotterdam ostensibly to Bergen; but she was in truth coming to a British port, and took a destination to Bergen to deceive French cruisers; and as the claim discloses (of

which I see no reason to doubt the truth) the goods were to be imported on account of British merchants, being most of them articles of considerable use in the manufacture and commerce of this country, and being brought under an assurance from the commissioners of the customs in Scotland that they might be lawfully imported without any license, by virtue of the statute 35 Geo. 3. c. 15.

It is said that these circumstances compose a case entitled to great indulgence; and I do not deny it. But if there is a rule of law on the subject binding the Court, I must follow where that rule leads me; though it leads to consequences which I may privately regret, when I look to the particular intentions of the parties.

In my opinion there exists such a general rule in the maritime jurisprudence of this country, by which all trading with the public enemy, unless with the permission of the sovereign, is interdicted. It is not a principle peculiar to the maritime law of this country; it is laid down by Bynkershoek as an universal principle of law—*Ex natura belli commercia inter hostes cessare non est dubitandum. Quamvis nulla specialis sit commerciorum prohibitio, ipso tamen jure belli commercia esse vetita, ipsae indictiones bellorum satis declarant, etc.* He proceeds to observe, that the interest of trade, and the necessity of obtaining certain commodities, have sometimes so far overpowered this rule, that different species of traffic have been permitted, *prout e re sua, subditorumque suorum esse censent principes*. But it is in all cases the act and permission of the sovereign. Wherever this is permitted, it is a suspension of the state of war *quoad hoc*. It is, as he expresses it, *pro parte sic bellum, pro parte pax inter subditos utriusque principis*. It appears from these pages to have been

the law of Holland; Valin, I. iii., tit. 6, art. 3, states it to have been the law of France, whether the trade was attempted to be carried on in national or in neutral vessels it will appear from a case which I shall have occasion to mention (*The Fortuna*) to have been the law of Spain; and it may, I think, without rashness be affirmed to have been a general principle of law in most of the countries of Europe.

By the law and constitution of this country, the sovereign alone has the power of declaring war and peace—He alone therefore who has the power of entirely removing the state of war, has the power of removing it in part, by permitting, where he sees proper, that commercial intercourse which is a partial suspension of the war. There may be occasions on which such an intercourse may be highly expedient. But it is not for individuals to determine on the expediency of such occasions on their own notions of commerce, and of commerce merely, and possibly on grounds of private advantage not very reconcilable with the general interest of the state. It is for the state alone, on more enlarged views of policy, and of all circumstances that may be connected with such an intercourse, to determine when it shall be permitted, and under what regulations. In my opinion, no principle ought to be held more sacred than that this intercourse cannot subsist on any other footing than that of the direct permission of the state. Who can be insensible to the consequences that might follow, if every person in time of war had a right to carry on a commercial intercourse with the enemy, and under color of that, had the means of carrying on any other species of intercourse he might think fit? The inconvenience to the public might be extreme; and where is the inconvenience on the other side, that the merchant should be com-



pelled in such a situation of the two countries to carry on his trade between them (if necessary) under the eye and control of the government charged with the care of the public safety?

Another principle of law, of a less politic nature, but equally general in its reception and direct in its application, forbids this sort of communication as fundamentally inconsistent with the relation at that time existing between the two countries; and that is, the total inability to sustain any contract by an appeal to the tribunals of the one country on the part of the subjects of the other. In the law of almost every country, the character of alien enemy carries with it a disability to sue, or to sustain in the language of the civilians a *persona standi in judicio*. The peculiar law of our own country applies this principle with great rigor. The same principle is received in our courts of the law of nations, they are so far British courts, that no man can sue therein who is a subject of the enemy, unless under particular circumstances that *pro hac vice* discharge him from the character of an enemy; such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the king's peace *pro hac vice*. But otherwise he is totally *exlex*; even in the case of ransoms which were contracts, but contracts arising *ex jure belli*, and tolerated as such, the enemy was not permitted to sue in his own proper person for the payment of the ransom bill; but the payment was enforced by an action brought by the imprisoned hostage in the courts of his own country, for the recovery of his freedom. A state in which contracts cannot be enforced, cannot be a state of legal commerce. If the parties who are to contract have no right to compel the performance of the contract, nor even to appear in a court of justice for that

purpose, can there be a stronger proof that the law imposes a legal inability to contract? To such transactions it gives no sanction; they have no legal existence; and the whole of such commerce is attempted without its protection and against its authority. Bynkershoek expresses himself with great force upon this argument in his first book, chapter 7, where he lays down that the legality of commerce and the mutual use of courts of justice are inseparable: he says, that cases of commerce are undistinguishable from cases of any other species in this respect—*Si hosti semel permittas actiones exercere, difficile est distinguere ex qua causa oriantur, nec potui animadvertere illam distinctionem unquam usu fuisse servatam.*

Upon these and similar grounds it has been the established rule of the law of this Court, confirmed by the judgment of the supreme court, that a trading which the enemy, except under a royal license, subjects the property to confiscation:—and the most eminent persons of the law sitting in the supreme courts have uniformly sustained such judgments.

In the *Ringendi Jacob* 1747, *Andreas Laud Master*, a Swede, which went from London to Bordeaux in ballast, there took in seventy-one tons of wine for Mr. Minet, Mr. Challie, and Mr. Fetherstonhagh to be delivered at Guernsey, but with false clearances at Bordeaux to deceive the enemy—condemned by the Lords of Appeal 7th of Feb. 1750, in affirmance of the judgment of the Admiralty.

In the *Lady Jane*, a Hamburgh ship laden at Malaga with mountain wine—cargo claimed by English merchants, as the produce of goods sent to Spain before the war—condemned 13th April, 1749; present Lord President, Archbishop of York, and Baron Clerke.

In the *Deergarden* of Stockholm—woolen goods shipped ostensibly to Lisbon, voyage in fact to the enemy's port at Bilboa, but on British account.—Cargo condemned 15th March, 1747.

In the *Elizabeth* of Ostend—Cargo the property of British subjects, coming from an enemy's port—condemned 27th Jan. 1749; present Duke of Dorset, Earl of Pembroke, Right Honorable W. Pitt, Mr. Justice Denison, Mr. Justice Clive: held, "that a British subject cannot trade with the enemy, but that the only punishment which the Admiralty can inflict was confiscation of the goods."

In the *William*, Lords, Dec. 19th, 1795; a case of a claim of Messrs. Munro, Macfarlane, and Co. of Grenada, for a quantity of sugars shipped on their account at Guadaloupe in June, 1793.

It appeared from the claimant's affidavit, that for some years prior to the war a trade had been carried on by the merchants of the British Islands, supplying the French Islands with slaves, on credit, to receive payment in sugars of the ensuing year. That there was, on that account, always a considerable debt due to them from the French merchants. That the sugar in question had actually been received at Guadaloupe by the agent of the claimants, for slaves sold on their account prior to the war.

The judgment of the Vice-Admiralty Court of St. Christopher, condemning the ship and cargo, was affirmed; present, Earl of Mansfield, President of the Council; Lord St. Helens, Sir Richard Pepper Arden, Master of the Rolls, and Sir W. Wynne.

I omit many other cases of the last and the present war, merely on this ground, that the rule is so firmly established, that no one case exists which has been permit-

ted to contravene it. For I take upon me to aver, that all cases of this kind which have come before that tribunal have received an uniform determination. The cases which I have produced prove that the rule has been rigidly enforced:—where acts of parliament have on different occasions been made to relax the navigation-law and other revenue acts; where the government has authorized, under the sanction of an act of parliament, a homeward trade from the enemy's possessions, but has not specifically protected an outward trade to the same, though intimately connected with that homeward trade, and almost necessary to its existence; that it has been enforced, where strong claims not merely of convenience but of necessity excused it on behalf of the individual; that it has been enforced where cargoes have been laden before the war, but where the parties have not used all possible diligence to countermand the voyage after first notice of hostilities; and that it has been enforced not only against the subjects of the crown, but likewise against those of its allies in the war, upon the supposition that the rule was founded on a strong and universal principle which allied states in war had a right to notice and apply mutually to each other's subjects. Indeed it is the less necessary to produce these cases, because it is expressly laid down by Lord Mansfield, as I understand him, that such is the maritime law of England; and he who for so long a time assisted at the decisions of that court, and at that period, could hardly have been ignorant of the rule of decision on this important subject; though none of the instances which I happen to possess prove him to have been personally present at those particular judgments. What is meant by the addition "but this does not extend to a neutral vessel," it is extremely difficult to conjecture, because no man was

more perfectly apprised that the neutral bottom gives, in no case, any sort of protection to a cargo that is otherwise liable to confiscation; and therefore I cannot but conclude, that the words of that great person must have been received with some slight degree of misapprehension.

What the common law of England may be, it is not necessary, nor perhaps proper for me to inquire; but it is difficult to conceive that it can by any possibility be otherwise, for the rule in no degree arises from the transaction being upon the water, merely in consequence of the insular situation of this country. But when an enemy existed in the other part of the island (the only instance in which it would occur upon the land) it appears, from the case referred to by that noble person, to have been deemed equally criminal in the jurisprudence of this country.

The general rule of law being in my apprehension clear, it is only to be inquired, whether there are any distinctions which take this case out of the application? and I need not add that these must be legal distinctions, and not such as present mere considerations of indulgence and compassion—or mere considerations of the utility of the particular commerce; for to these the court has no power to give way. A reference has been made to the statutes.—It is not argued that the statutes will, in the just apprehension of them, authorize such a trade, but they might have led to an innocent mistake on the subject. These statutes, it is admitted, were made to apply only to the property of persons in Holland, while hostilities were impending. It was necessary that some provisions should be made for the security of the loyal Dutchmen who might migrate to this country. It was found necessary, on this account, to relax the navigation laws; and for this purpose an order

of council first issued, which was afterwards confirmed by these acts, as necessary to support the order and protect those who acted under it, but merely with respect to property so circumstanced. These were mere custom-house regulations, and nothing else; and it is impossible to entertain a doubt respecting the interpretation of them.

It appears that these parties had before applied to the council for special orders, and had always obtained them. It is much to be regretted that they had not applied again to the same source of information: instead of doing so, they consulted the commissioners of the customs, very proper judges, to ascertain what goods might be imported under the revenue laws: but this is a matter of general law, on which they are not the persons best qualified to give information or advice. The intention of the parties might be perfectly innocent; but there is still the fact against them of that actual contravention of the law, which no innocence of intention can do away. The same pleas were urged, and with equal reason, for Mr. Escott, and in many other cases: but it has been decided by a court which has much greater power of construction, that such pleas could not be sustained. I may feel greatly for the individuals who, I have reason to presume, acted ignorantly under advice that they thought safe: but the Court has no power to depart from the law which has been laid down; and I am under the necessity of rejecting the claims.

Freight and expenses were given to the master.

On application that the Court would decree the expenses of the claim to be paid out of the cargo, it was contended, that there was no instance in which the Court had done this, but in cases of recapture.

The Court directed the expenses to be paid.

## CHAPTER IX.

### TERMINATION OF WAR.

War may be brought to an end in any one of the following ways: A cessation of hostilities, without any agreement, the destruction of one of the parties, or by a treaty of peace. Of these the last is by far the most common and regular way of terminating a war.

As a continuance of war depends upon the use of force, it is clear that whenever both sides choose they may cease using force and thus bring their war to an end. This must be distinguished from a truce, as in the latter there is an agreement, while in the former there is not. In the truce there is usually an express and always an implied agreement that hostilities will begin again unless satisfactory terms of peace can be agreed upon; in a mere cessation of hostilities there is no such intention declared or implied. This method of terminating a war is very unsatisfactory, as it leaves the relation of the parties uncertain, and hence interferes with their normal development. Furthermore, it is an injustice to neutrals who are entitled to know by what rules their commercial and other dealings with the parties are to be governed. For these reasons the method has always been exceptional between Christian states. It was, however, the rule with the Turks up to the treaty of Kutschuk-kainardji, 1774. In their case this practice can be accounted for from the fact that the Koran forbids believers making peace with infidels. Perhaps for this reason the King of Burmah refused to enter into a treaty with Great Britain; at any rate, the

war between Great Britain and Burmah ended by a cessation of hostilities.

**Examples as  
between Chris-  
tian nations.**

Yet even as between Christian nations wars have ended in this way. In 1702 the war which had been going on between France and Spain ceased without any agreement. And twelve years later the war between Sweden and Poland came to an end in this way. During the nineteenth century, even, there were scattered examples of wars that simply died out because the parties to them did not take a sufficiently lively interest in them to continue hostilities or to formally terminate them. Such was the case in the war between Russia and Persia, inherited by Paul from Katharine, which terminated in 1801. But the most conspicuous example is the war between Spain and the South and Central American Republics. Hostilities had practically ceased when the United States recognized their independence, and by 1824 the war had died out, yet this fact was not recognized by Spain until a quarter of a century later, for it was not until 1850 that peaceful relations were established between her and those republics.

**Destruction of  
one of the  
parties.**

A termination of war may, of course, result from the destruction of one of the parties. This destruction may be either actual or legal, i. e., extermination or conquest. The former could hardly happen now among civilized peoples, and hence needs no discussion; the latter is relatively common. Where it extends over an entire state, it is clear that there can be no treaty of peace, for the political and legal existence of one of the parties is at an end and hence there is no longer the prime requisite of a treaty — parties.

As we have already seen, military occupation, though not conquest, is one stage in the progress of affairs leading up to conquest. In order that the latter may be



definitely distinguished from the former, without waiting for the change to be wrought by prescription, the conqueror should make a declaration of his intention to assume sovereignty over the conquered state.

The location of the power to convert military occupation into conquest differs in different states. In the United States it resides in Congress, while in England it resides in the King. As a consequence of this, the King may provide for the civil government of the territory without any action by Parliament, while the President can only make provisions for continuing the military government. This, however, is primarily a question of constitutional not of international law.

Power to decide when military occupation becomes conquest.

The effect of conquest is to transfer the rights of the conquered state to the conqueror. It therefore changes the allegiance of the citizens from the conquered to the conquering state. It is customary, however, in case of the conquest of part of a state to grant to those who wish to retain their old citizenship the privilege of doing so by moving out of the conquered territory; this was done in the case of Alsace and Lorraine. But in the case of the conquest of an entire state a retention of their old citizenship would be manifestly impossible. From the legal point of view, conquest validates the previous possession of the conqueror. Private or municipal laws are not changed by the fact of conquest, — only the right to change them, not their change, is effected by conquest. With public laws it is different. The public law of the conquering state is substituted for that of the conquered state by the mere fact of conquest. The title to private property is not affected by conquest.

Effect of conquest.

We come now to the regular way of ending a war, viz., by a treaty of peace. The power to make treaties of peace is usually the same as that to make any other treat-

**Termination of war by treaty of peace.** ies. In the United States it is vested in the President "by and with the advice and consent of the Senate." They

are almost invariably negotiated by envoys or commissioners selected for that particular purpose, though the treaty of Tilsit and others were negotiated and signed directly by the sovereigns of the states that were parties to them.

**Date when treaty of peace becomes binding.**

A treaty of peace, like other treaties, becomes binding from the date of its signature, unless otherwise provided in the treaty itself. If hostilities have not already ceased as a result of an armistice, they should cease with the signing of the treaty of peace. While it is true that a treaty of peace may not be ratified by the ratifying power, the chances of this are not such as to warrant a continuance of hostilities pending this action. If by accident hostilities do continue after the signing of the treaty of peace, as in the case of the battle of New Orleans, the parties are not allowed to reap any advantage from such action, but are to be placed as nearly as possible in the same position as though such acts had not taken place. In other words, the treaty nullifies acts of hostility subsequent to the date of its signature.

**Provision for different dates at different places.**

When the means of conveying intelligence were such that it would take days and even sometimes months for knowledge to reach distant places, it was not uncommon to make provision for this in treaties of peace so that the treaty went into effect at different dates in different places. As the purpose of this was simply to allow time for the receipt of knowledge, if information were actually received before the expiration of this time, hostilities were to cease with the receipt of actual knowledge of the fact that a treaty of peace had been signed. A military or naval commander could not, however, be expected to act upon information which is not official.

He may, therefore, insist that the information be received through his own government. This rule is strikingly illustrated by the case of the *Swineherd*.

This vessel had been fitted out as a cruiser and was at Calcutta when it received notice of the signing of the treaty of Amiens. As a result of this information, it took along barely enough powder to fire salutes. In the Indian Ocean it was overhauled by the French privateer *Bellone*, to which it conveyed the information concerning peace which it had received from the Calcutta Gazette. But the commander of the *Bellone* refused to accept this information as authentic and took the *Swineherd* to a prize court of France. It was decided by the Conseil des Prises that as the five months, allowed by the treaty for information to reach the place where the capture was made, had not elapsed, the French commander did not have constructive notice of the signing of the treaty, and as he was not obliged to accept actual notice, except through his own government, he had no actual notice, and therefore the capture was valid. The vessel was condemned as lawful prize. Under the peculiar circumstances of the case, this decision seems extremely technical, but it is unquestionably in accordance with law. In this particular case the commander of the *Swineherd*, was acting in good faith and giving correct information, but the belligerent has not a sufficient warrant for believing that such will always be true of information received through the enemy or any other source than his own government.

A treaty of peace puts an end to all disputes leading up to the war, and so far as those are concerned it produces a *tabula rasa*. The same is true of disputes that have arisen during the war. As a treaty of peace thus settles all disputes that have provoked the war or have been provoked by it, it would be an act of bad faith to

The case of the  
*Swineherd*.

Effect of treaty  
of peace upon  
pre-existing  
disputes.

again go to war for any of these causes. But, unless otherwise provided, a treaty of peace does not extinguish claims based upon contracts or torts arising previous to the war, but unconnected with the causes which led to it.

A treaty of peace revives the contracts of a state which have been suspended by the war. It also revives the private contracts thus suspended, unless the changed circumstances have rendered their fulfillment impossible.

**Interpretation  
of treaties of  
peace.**

Treaties of peace are interpreted most strongly against the victor. This rule is based upon the ground that he might have inserted any other words or phrases he pleased, while the vanquished has no such power of choice. They are also interpreted in accordance with the rule of *uti possidetis*, i. e., if certain things are not mentioned in the treaty it is taken for granted that it was intended to sanction the conditions which existed at the time it was signed. As, for instance, if one of the parties is, at the time of the signing of the treaty, in military possession of a part of the other's territory and no mention is made of it in the treaty, this is interpreted as meaning that such territory is virtually ceded to the military occupant. In other respects treaties of peace are interpreted in accordance with the ordinary rules of the interpretation of treaties.

## PART V.

### NEUTRALS.

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#### CHAPTER I.

##### GROWTH OF NEUTRAL RIGHTS AND DUTIES.

The rights of belligerents as against each and the relations which should exist between states at peace with each other have always had a place in international law; but the relation between belligerents and states at peace, *i. e.*, the rights and duties of neutrals, can hardly be said to have had a place in international law until comparatively recent times. In fact the conception of a neutral state can hardly be said to have existed during ancient or medieval times. During ancient times, and to almost the same extent during the Middle Ages, states were divided by the belligerent into friends and foes. The idea that a state could insist upon remaining a disinterested spectator, and have its rights as such respected, does not seem to have occurred to them. "Whosoever is not for me is against me," was the rule applied by the belligerents in determining their relation to other states. The application of this rule resulted of course in the classification of states into allies and enemies, but made no provision for a third class—neutrals. Neither the Greeks nor the Romans had any equivalent for the word neutrality. The reason for this is because they had nothing in fact corresponding to it.

As late as the opening of the seventeenth century there was practically no law of neutrality. There were, it is true, scattered treaty provisions for the purpose of protect-

Neutrality a recent conception.

Condition at the opening of the 17th century.

ing neutral trade, but no well-established restrictions upon the use which a belligerent might make of the territory of a state which was not a party to the war, no law preventing the latter from furnishing levies of troops, munitions of war, or money to either of the belligerents. True, there were cases in which these acts became so flagrant as to be considered a *casus belli*, but there was no general understanding as to what was or what was not permissible; so that if punishment were inflicted, it was because of incurring displeasure rather than because of violating law. Even in the writings of the most advanced text-writers we find little which furnishes a guide as to what was considered permissible.

**View expressed by Grotius.** The nearest Grotius comes to definiteness upon the subject is when in his chapter "Concerning Who Are Not Parties in a War," he says: "It is the duty of those who stand apart from a war to do nothing to strengthen the side whose cause is unjust, nor to impede the measures of a power engaged in a just and righteous cause. But in doubtful cases, they ought to shew themselves impartial to both sides, and to give no succor to besieged places, but should allow the troops of each to march through the country, and to purchase forage, and other supplies. The Corcyraeans, in Thucydides, say that if the Athenians intend to remain *neuter*, they ought either to prohibit the Corinthians from enlisting men in the territory of Attica, or to give them the same privilege." (Bk. III, chap. 17.)

**The more definite expression by Bynkershoek.** As we have suggested in an earlier chapter, the first approach to definiteness, upon this subject, to be found among the writings of publicists, is found in the writings of Bynkershoek, whose works did not appear until nearly the middle of the eighteenth century. From his "Questions of Public Law" we get the following clear statement: "I call those non-enemies who are of neither party to a war, and who owe nothing by treaty to either one side

or to the other. If they are under any such obligation, they are not mere friends but allies. Their duty is to use all care not to meddle in the war. If I am neutral I cannot advantage one party lest I injure the other. The enemies of our friends may be looked at in two lights, either as our friends, or as the enemies of our friends. If they are regarded as our friends, we are right in helping them with our counsel, our resources, our arms, and everything which is of avail in war. But in so far as they are the enemies of our friends, we are barred from such conduct, because by it we should give a preference to one party over the other, inconsistent with that equality of friendship which is above all things to be studied. It is more essential to remain in amity with both than to favor the hostilities of one at the cost of a tacit renunciation of the friendship of the other." (Quaestiones Juris Publici, Lib. I, c. IX.)

But it must not be supposed that the practice of nations had reached the point in its development set for it by the writers. Even as late as the end of the seventeenth century it was by no means exceptional for one state to loan whole regiments to a belligerent and yet claim to be observing the rules of neutrality. Thus, France in 1631 allowed the Marquis of Hamilton to lead 6,000 French troops to the assistance of Gustavus Adolphus, without becoming a party to the war. And in 1677, certain members of Parliament made inquiry as to the "regiments that the King kept in the French army, and of the great service done by them."

Practice of 17th century as to aid given by neutrals.

By the treaty of 1656 between England and Sweden, it was provided that it should be "lawful for either of the contracting parties to raise soldiers and seamen by beat of drum within the kingdoms, countries, and cities of the other, and to hire men of war and ships of burden." Nor was this treaty considered at that time a treaty of alliance.

**Treaties of 17th century providing for assistance by neutrals.**

From the treaty of 1675 between Louis XIV. and the Duke of Brunswick we can readily conclude that the making of levies and allowing the passage of the troops of belligerents through the territory of a neutral were not, apart from treaty, recognized as violations of neutrality. For in this treaty it is provided that "his Highness will not anywhere assist the enemies of the King directly or indirectly, and will not permit any levies to be made in his States, nor the passage of troops through them, nor the formation of any kind of magazines." (Dumont VIII, p. 312.) Such provisions would of course be of no practical use if it were the well recognized duty of a neutral to refrain from doing such things.

**Passive assistance not forbidden.**

So far as can be discovered from available sources of information, up to the end of the seventeenth century the obligations resting upon a neutral did not go further than to forbid his rendering active assistance to one belligerent, unless the same privilege were extended to the other. Passive assistance was not forbidden; neither was it contrary to the rules of neutrality for a state to allow its citizens to render such assistance as they might see fit to render.

**Acts of belligerents in neutral territory.**

The conception that it was the duty of a neutral to extend protection to the property of belligerents which might come within its jurisdiction was still in embryo. Though recognition of the duty of the neutral to protect, and the obligation of the belligerent to refrain from acts of violence within neutral territory, was in process of formation, that the practice of the century did not conform to the theory is shown by the following examples: "In 1827, the English captured a French ship in Dutch waters; in 1631, the Spaniards attacked the Dutch in a Danish port; in 1639, the Dutch were in turn the aggressors, and attacked the Spanish fleet in English waters; again in 1666, they captured English vessels in the Elbe, and in



spite of the remonstrances of Hamburg and of several other German states, did not restore them; in 1665, an English fleet endeavored to seize the Dutch East India squadron in the harbor of Bergen, but were beaten off with the help of the forts; finally, in 1693, the French attempted to cut some Dutch ships out of Lisbon, and on being prevented by the guns of the place from carrying them off, burnt them in the river" (Hall, pp. 604-605.)

During the eighteenth century, considerable progress was made both in theory and practice. We have already called attention to Bynkershoek's statement of the obligations of a neutral, contained in his writings which were published in the first half of the century. Writing in the second half of the century, Vattel defines neutrality as consisting in "an impartial attitude so far as the war is concerned, and so far only; and it requires: 1st, that the neutral people shall abstain from furnishing help when they are under no obligation to grant it, and from making free gifts of troops, arms, munitions, or anything else of direct use in war. I say that they must abstain from giving help, and not that they must give it equally, for it would be absurd that a state should succor two enemies at the same moment. Besides, it would be impossible to do so equally; the very same things, — the same number of troops, the same quantity of arms, munitions, etc., furnished under different circumstances, are not equivalent succor. Second, that in all matters not bearing upon the war a neutral and impartial nation shall not refuse to one of the parties, because of the existing quarrel, that which it accords to the other." (Law of Nations, Bk. III., C. XII.)

Vattel's idea of  
neutrality.

Yet under the view of neutrality held by Bynkershoek and Vattel, it was lawful for a neutral to furnish troops to a belligerent, if it had with the latter a treaty requiring it to do so. England had a number of

**Treaties for  
assistance by  
neutrals.**

treaties of this sort with the German States and both in the Seven Years' War and the American Revolution troops furnished under treaties were to be found in her armies. At present, such treaties would undoubtedly be considered treaties of alliance, and, if adhered to, the parties would be considered allies, rather than allowing one to render military assistance and still be considered a neutral. It was not, however, until 1788 that the right of a neutral to furnish troops to a belligerent in accordance with treaty provisions was seriously questioned. In that year, Sweden claimed that by rendering military assistance to Russia, then at war with Sweden, Denmark was violating the laws of neutrality, notwithstanding the fact that such assistance was provided for by the treaty between Denmark and Russia. In taking this position, Sweden was considerably in advance of the time, she was anticipating a future rule rather than stating an existing one. The case and counter-case in this controversy will be seen from the following: —

The Declaration of Denmark was as follows: —

**Correspondence  
between Den-  
mark and  
Sweden.**

“ His Danish Majesty has ordered the undersigned to declare, that although he complies with the Treaty between the Courts of Petersburg and Copenhagen, in furnishing the former with the number of ships and troops stipulated by several Treaties, and particularly that of 1781, he yet considers himself in perfect amity and peace with His Swedish Majesty, which friendship shall not be interrupted, although the Swedish arms should prove victorious either in repulsing, defeating or taking prisoners, the Danish troops now in the Swedish territories acting as Russian auxiliaries, under Russian flags. Nor does he conceive that His Swedish Majesty has the least ground to complain, so long as the Danish ships and troops now acting against Sweden do not exceed the number stipulated by Treaty; and it is his earnest desire that all friendly and

commercial intercourse between the two nations, and the good understanding between the Courts of Stockholm and Copenhagen, remain inviolably as heretofore.

(Signed) COUNT DE BERNSTORF.

Delivered to the Baron de Sprengtporten, His Swedish Majesty's Minister Plenipotentiary at the Court of Copenhagen.

“Sept. 23, 1788.”

The Counter-Declaration of Sweden was as follows:—

“The declaratory note delivered by the Count Bernstorf to the undersigned, in which His Danish Majesty conceives that His Swedish Majesty cannot have any ground of complaint, as long as the Danish ships and troops merely act as auxiliaries to Russia, is a doctrine which His Swedish Majesty cannot altogether reconcile with the Law of Nations and rights of Sovereigns, and against which His Majesty has ordered the undersigned to protest.

“Nevertheless, to prevent an effusion of blood between the subjects of the two kingdoms, and particularly at the moment when a negotiation has begun to restore perfect peace and tranquillity in the North of Europe, which affords a pleasing prospect of a general peace, His Swedish Majesty, from motives of a love of peace, waives entering into a speculative discussion whether or not there is a cause or ground of complaint on his side, and rests perfectly satisfied with the assurances contained in His Danish Majesty's declaration, that His Danish Majesty has no hostile views against Sweden, and that the friendly and commercial intercourse between the subjects of both kingdoms, and the good understanding between the two Courts shall remain uninterrupted.

“His Swedish Majesty puts the strongest faith and utmost confidence in what Mr. Elliot, Envoy Extraordinary and Minister Plenipotentiary of His Britannic Majesty, has represented to him on this important occasion.

"His Majesty, therefore, to prevent the horrors of War and the calamities impending the two nations, anxious to behold peace and union restored between them, embraces with satisfaction His Danish Majesty's declaration, and particularly as it will facilitate the negotiations for a general peace, which is happily begun through the mediation of Great Britain, France, Holland, and Prussia, and the good success of which is the greatest object of His Majesty's ambition, and which His Majesty has fully declared to the aforesaid Mr. Elliot, provided the defeating of the Russian auxiliaries is not considered as hostilities against His Danish Majesty, agreeable to the declaration delivered by Count Bernstorff.

(Signed)

"BARON DE SPRENGTPORTEN.

"Dated, Stockholm, Oct. 6, 1788, and delivered to the Count Bernstorff, at Copenhagen."

Equipment of  
cruisers in  
neutral territory  
for the aid of  
one of the bel-  
ligerents.

About the same time the question of the lawfulness of allowing private adventurers to equip cruisers in neutral territory to operate under letters of marque from one of the belligerents was brought into question by a dispute between England and France, concerning the Reprisal, an American privateer. As England based her protest upon provisions of the treaties of Utrecht and of Paris, which were of doubtful application to the facts of the case, it seems entirely clear that at that time such acts were not, apart from treaty, contrary to the law of nations.

But it was not until within a few years of the close of the century that the law of neutrality was set forth in such a clear and convincing tone that its more important principles can be said to have been definitely understood and established.

Influence of U.  
S. at close of  
18th century.

For this service, and it was undoubtedly a most valuable service, the credit is due largely to the United States. The occasion for this expression of its views was the violation

of what it considered to be its neutrality by the French Minister Genet. In a letter to the latter, Jefferson said, "that it is the right of every nation to prohibit acts of sovereignty from being exercised by any other nation within its limits, and the duty of a neutral nation to prohibit such as would injure one of the warring powers; that the granting of military commissions within the United States by any other authority than their own, is an infringement of their sovereignty, and particularly so when granted to their own citizens to lead them to commit acts contrary to the duties they owe to their country." (American State Papers, Vol. 1, p. 67.) And in writing to Mr. Morris, the American Minister in Paris, about two months later, he says: "that a neutral nation must in all things relating to the war observe an exact impartiality towards the two parties, and that the right of raising troops being one of the rights of sovereignty, and consequently appertaining exclusively to the nation itself, no foreign power or person can levy men within its territory without its consent; that if the United States have a right to refuse the permission to arm vessels and raise men within their ports and territories, they are bound by the laws of neutrality to exercise that right and to prohibit such armaments and enlistments." (American State Papers, Vol. 1, p. 116.) Instructions were given by the President for the purpose of giving effect to these views as to the rights and duties of a neutral.

In commenting upon this, Mr. Hall, the great English publicist, who is in general not at all given to entering into encomiums with reference to the United States, says: "The policy of the United States in 1793 constitutes an epoch in the development of the usages of neutrality. There can be no doubt that it was intended and believed to give effect to the obligations then incumbent upon neutrals. But it represented by far the most advanced existing opinions as

Jefferson's  
views as to  
neutrality.

Hall's estimate  
of the influence  
of the U. S.  
upon the law of  
neutrality.

to what those obligations were; and in some points it went further than authoritative international custom has up to the present time advanced. In the main, however, it is identical with the standard of conduct which is now adopted by the community of nations." (International Law, p. 616.)

In order to enforce these views of neutrality it became necessary for Congress to legislate upon the subject. This resulted in our first neutrality act, that of June 5, 1794.

**Neutrality acts.** This act and the supplementary act of 1818 made it unlawful for a citizen of the United States to accept a military commission, within the United States, from any foreign state, prince, etc. It also prohibited the fitting out in the ports of the United States any war vessel, for the purpose of aiding a state in waging war against a state with which we were at peace. It also prohibited the augmenting of the force of a warship or privateer of a foreign state, while within our ports, provided said state was at war with a state in amity with the United States. It made unlawful the capture by a foreign state of the vessels of states friendly to us, while within a marine league of our shore. It authorized the President to employ our military and naval forces for the purpose of preventing violations of our neutrality.

**The First Armed Neutrality.** The practical service rendered by the armed neutrality of 1780 in securing a better recognition of neutral rights must not be overlooked. This combination of neutral powers set forth a declaration of principles chief among which were: free ships, free goods; a blockade must be made effective by vessels stationed sufficiently near to make entry and exit evidently dangerous. These principles have since been incorporated into international law. It also limited contraband goods to munitions of war and sulphur. This latter contention has never been generally adopted. With the then great European powers at war, the tempta-

tion to enlarge belligerent at the expense of neutral rights was so great that, but for the coalition of the northern powers, neutral trade would have been accorded merely such rights as the belligerents saw fit to grant.

The Napoleonic wars brought another very severe strain upon the laws of neutrality, particularly as regards neutral trade. This led to the Second Armed Neutrality, 1800, which reiterated the principles set forth by its predecessor. But when Russia became one of the belligerents, the coalition was deprived of its head and its influence and power to enforce respect for its declarations were very materially lessened. Between the Orders in Council and the Decrees of Berlin and Milan neutral trade was subjected to almost ruinous restrictions.

As a result of the relative weakness of those powers which contended for rights of neutrals as embodied in the principles: free ships, free goods, and that a blockade in order to be binding must be effective, these principles cannot be said to have formed a part of international law at the close of the Napoleonic wars. But from this period on several of the states inserted them in their treaties and during the period of peace which followed the conflagration kindled by France, the conception rapidly gained ground that after all the rights of belligerents were not of such transcendent importance that neutral commerce must be left to the mercy or caprice of belligerents.

But the above questions were not definitely settled in favor of neutrals until the Conference of Paris, 1856. By this time public opinion had reached the point where practically all the nations were forced to consent to a recognition of principles, which had struggled nearly a century for a place in international law. These were: 1st, "Privateering is and remains abolished. 2d, The neutral flag covers enemy's goods, with the exception of contraband of war. 3d, Neutral goods, with the exception of contraband of war, are

The Second  
Armed Neu-  
trality.

Transition  
period following  
Napoleonic  
Wars.

The Conference  
of Paris.

not liable to capture under the enemy's flag. 4th, Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy."

**Effect of above rules.** The effect of the first of these was to relieve neutral commerce of the risks due to the presence along its paths of a number of vessels the income of whose crews depended upon the number and value of captures made. Under such circumstances, captures were frequently made upon slight evidence of guilt and the neutral vessels thus seized were at least subjected to the annoyance of delay, nor was it unusual to manufacture evidence in order to secure a decree of confiscation by the prize court. The second rule appears to be a concession to belligerents whose food supply is dependent largely upon imports, and to a certain extent it is, but it has been of very substantial assistance to the carrying-trade of neutrals. The third rule is so manifestly a concession to neutrals that discussion of it is unnecessary. The fourth put an end to paper blockades which at the beginning of the century had proved so ruinous to neutral trade and from which the United States was the chief sufferer. As has already been pointed out, not all nations have given their consent to these rules, but a sufficient number have done so expressly and others tacitly, that their legality is not likely to be questioned.

**Neutral duties.** But the development of the law of neutrality in the nineteenth century was not confined to an enlargement of neutral rights, it included also a better recognition of neutral duties. The neutral was no longer free from blame, provided it rendered no direct aid through its governmental agencies; it must now refrain from certain forms of passive aid and must see to it that its citizens observed the laws of neutrality.

Thus it has become the duty of a neutral to refuse permission to a belligerent to move his troops across its



territory and even to use force in order to prevent its being done. This new rule was adhered to by Belgium during the Franco-Prussian war. Prussia requested the privilege of carrying her wounded and prisoners' from Sedan to German territory across Belgium. This request appeared innocent enough, but upon second thought it could be readily seen that it was for the purpose of relieving the strain upon the railways upon which the German army depended for its supplies and munitions of war. To grant the request would therefore be to give very substantial military assistance to Germany, as it would increase the effectiveness of her armies in their operations against France. After consultation with England, Belgium refused to grant the request.

Passage of  
troops.

The neutral government is likewise to refrain from loaning money to either belligerent, also from selling, loaning or giving munitions of war to either, though it is still lawful for its citizens to do these things. The sale of arms and military stores by the United States in 1871 would have been a violation of this rule, but the sale was ordered by Congress before the Franco-Prussian war was thought of, and the firm to which the materials were sold, the Remingtons, were not, to the knowledge of the United States, acting as the agents of either belligerent. The sale was therefore a purely business transaction, which, under the circumstances, was not a violation of our duties as a neutral. But it would have been had the United States known or had reasonable grounds for believing that the firm to whom it sold was acting as the agent of either belligerent. The rule is illustrated by the conduct of Sweden in 1825. In that year she was desirous of selling some of her war vessels, and succeeded in selling three of them to an English firm which she afterwards learned was acting as the agent of Mexico then at war with Spain. Upon ascertaining this fact, Sweden revoked the sale.

Loans of money  
and sales of  
munitions of  
war.

**Enlistment of  
troops in neutral  
territory.**

It is now well recognized that it is the duty of the neutral not only to refrain from granting permission to either of the belligerents to enlist troops within its territory, but it must use proper diligence in preventing such enlistment. The United States led the way in this direction by its Neutrality Acts, and the duty is now amply recognized in the Foreign Enlistment Acts of Great Britain and the legislation of other nations. Private citizens violating these laws are criminals and as such are subject to punishment. True, if a citizen of a neutral state leaves it and enlists in the service of either of the belligerents he is doing something which as regards the other belligerent he has a right to do and the neutral state is under no legal obligation to prevent his doing it. So far there is no difficulty. The difficulty arises when several go at a time and it becomes necessary to determine whether or not they constitute an armed expedition. If they do, it is clearly the duty of the neutral to prevent their departure, and this is equally true whether the expedition is made up of its own citizens or of other persons within its territory. For, in either case, it would be guilty of allowing its territory to be used as a base of operations.

**Case of French  
men returning  
from United  
States in 1871.**

A curious case upon this point arose in 1871, when twelve hundred Frenchmen left New York City for France on two vessels, The Lafayette, and The City of Paris. It was generally understood that these men were going home to enlist in the French army. Upon the same vessels were 96,000 rifles and 11,000,000 cartridges. Mr. Fish, who was then Secretary of State, took the view that as the men were not organized or drilled they were not an effective military force, and did not constitute a hostile expedition, and that therefore it was not the duty of the United States to prevent their departure. Concerning this, Mr. Hall says: "There can be no doubt that the view taken by the

government of the United States was correct.” (International Law, p. 631.)

The question becomes still more puzzling when the different elements of the expedition are harmless alone but are to be combined outside the neutral territory into an effective force. The view taken by the United States, which seems entirely reasonable, is that it matters not whether the combination is made within the neutral territory or outside of it, the duty of the neutral to prevent it is clear, provided the neutral has reasonable notice of the intent. The opposite view taken by Great Britain during our Civil War, lends itself too readily to fraudulent practices. For, if the neutral government, though claiming to occupy a position of strict neutrality, be in sympathy with either belligerent it may permit an unarmed war-vessel to leave one of its ports, the armament another, and the crew another. Now, each of these is harmless in itself, but if the intent to combine them be known, and it generally is, the obligation of the neutral not to allow its territory to be used for the purpose of fitting out hostile expeditions against either belligerent should not be allowed to be interfered with by such subterfuges.

Though not universally recognized, the duty of a neutral not to allow the warships of either belligerent to remain in its ports for more than twenty-four hours, unless additional time is necessary for repairs or putting them in a condition to reach their nearest home port, has within the last half century become pretty well fixed. The repairs and supplies permitted should be such only as are necessary to their sea-worthiness, and should not be allowed to extend to increasing their effectiveness as fighting-machines. Thus, there must be no increase or repair of their armament; no augmentation of the crew, further than is necessary for navigating the vessel; no greater supply of

Combination of elements of expedition outside neutral territory.

Stay of belligerent warships in neutral ports.

coal, food, etc., than is reasonably necessary to enable them to reach their nearest home port, or other port under their control.

**Case of Russo-Japanese war.** The use of neutral ports by belligerent war vessels became a question of vital interest during the Russo-Japanese war. The Baltic Fleet exceeded the twenty-four hour limit at Djibutil, Madagascar, Kamrahn Bay, and Hon-Kohe Bay. The stay of nearly a month in the two latter ports for the purpose of effecting a junction of the different divisions of the fleet, for recoaling, reprovisioning, etc., was particularly aggravating as it was so near the scene of action. Though France had not in her proclamation of neutrality agreed to observe the twenty-four hour rule, a careful study of the facts in the case leaves little room for doubt that France was guilty of violating the laws of neutrality by permitting her ports and territorial waters to be used as they were by the Russian fleet.

**Belligerent warships driven into neutral ports by stress of weather.** When from stress of weather or other reasons the warships of opposing belligerents chance to be found in the same neutral port, it is the duty of the neutral to see that those of one do not leave until twenty-four hours has elapsed since the departure of those of the other. This is a rather recent rule, but may be said to be fairly well established. True, it might be difficult, if not impossible, for a neutral having a weak navy to enforce this rule, but experience has shown that a resort to force would very rarely be necessary, provided the neutral makes a clear and positive statement of its wishes.

**Enforced departure or internment.** If, instead of being in the neutral port, the warships of one of the belligerents are just outside its territorial waters waiting for an opportunity to attack those of the other as soon as they come out, it becomes the duty of the neutral to require the warships of the belligerent which are in its port either to depart within twenty-four hours, provided

they are seaworthy, or disarm; and, if they choose the latter alternative, to keep them and their crews interned for the remainder of the war. The same requirement should be made of such vessels, no matter upon what ground they refuse to leave a neutral port within twenty-four hours after notice. This rule has been enforced during the recent Russo-Japanese war in the cases of the *Mandjur*, *Grozovoi*, *Czarevitch*, *Lena*, *Aurora*, etc., though with a trifle of tardiness in some cases.

It is not the duty of the neutral to prevent its ports being used by the belligerent for the purpose of bringing in and selling its prizes. This rule has been established during the nineteenth century. For though there were some treaties to this effect during the eighteenth century, *e. g.*, the treaty of 1778 between the United States and France, and of 1794 between the United States and England, which provided for the exclusion of prizes of the enemies of either from the ports of the other, — the practice was in general to allow such use of neutral ports. In 1861, England refused the Confederacy the right to bring prizes into her ports and by Orders in Council of that year excluded the prizes of either party from her ports and territorial waters. She pursued the same course during the Franco-Prussian, Spanish-American, and Russo-Japanese wars. France and the United States have also recognized the rule so that it may now be said to form a part of international law.

It is the duty of the neutral to require the troops of either belligerent entering its territory to lay down their arms and to intern them for the balance of the war. With reference to warfare on land there is no question but that this is the duty of the neutral; and many contend that the same rule should be applied to naval warfare, with the variation that in the latter case twenty-four hours is to be allowed them in which to depart. The Russo-

Japanese war presented an anomalous condition, for in it practically all the hostilities on land were on what was, nominally at least, neutral territory. But largely through the wisdom and foresight of John Hay the amount of neutral territory which was to be used as a field of hostile action by the belligerents was limited to Manchuria and Korea. It was recognized that should the troops of the belligerents enter other parts of China than Manchuria, it would be the duty of China to require them to disarm and to intern them for the balance of the war.

**Effect of Geneva  
Arbitration.**

Perhaps no event has gone further toward calling attention to the duties of neutrals, and, to a certain extent, fixing their duties, than the Geneva Arbitration. The principles upon which the arbitrators acted were that a neutral government is bound — “First, to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part within such jurisdiction, to warlike use.

Secondly, not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

Thirdly, to exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.

And the High Contracting Parties agree to observe these rules as between themselves in future, and to bring them to the knowledge of other maritime powers, and to invite them to accede to them.”

Though neither the Treaty of Washington nor the arbitration provided for by it could make these rules a part of international law, the decision of this greatest arbitral proceeding called the attention of the world to them, and their reasonableness has so far commended them that they may now be fairly said to be a part of the law of nations.

We have so far been considering what is termed natural or perfect neutrality, which is the form ordinarily meant when we speak of neutrality. But it may be well before leaving the subject to call attention to what may be termed imperfect, qualified, or conventional neutrality. Examples of this form is the neutrality guaranteed by convention to Switzerland, Belgium, Cracow, Corfu, etc. The reason for guaranteeing the permanent neutrality of these is their geographical position. For instance, while Switzerland is neutral territory, the borders of France are protected from attack by Austrian forces and Austria from attack by the French. In like manner the neutrality of Belgium forms a mutual protection to the borders of Germany and France. The modification of neutrality due to a treaty between the neutral and either belligerent, we have already had occasion to notice, in discussing the furnishing of troops, etc., by the neutral.

#### THE SANTISSIMA TRINIDAD.

(7 Wheaton, 283.)

SALE OF WARSHIPS TO BELLIGERENTS BY NEUTRALS — AUGMENTATION OF CREW OF BELLIGERENT WARSHIPS IN NEUTRAL TERRITORY A VIOLATION OF NEUTRALITY.

Story, J., delivered the opinion of the court.

Upon the argument at the bar several questions have arisen, which have been deliberately considered by the court; and its judgment will now be pronounced. The first in the order, in which we think it most convenient to consider the

cause, is, whether *The Independencia* is in point of fact a public ship, belonging to the government of Buenos Ayres. The history of this vessel, so far as is necessary for the disposal of this point, is briefly this: She was originally built and equipped at Baltimore, as a privateer, during the late war with Great Britain, and was then rigged as a schooner, and called *The Mammoth*, and cruised against the enemy. After the peace she was rigged as a brig, and sold by her original owners. In January, 1816, she was loaded with a cargo of munitions of war, by her new owners, (who are inhabitants of Baltimore,) and being armed with twelve guns, constituting a part of her original armament, she was dispatched from that port, under the command of the claimant, on a voyage, ostensibly to the Northwest Coast, but in reality to Buenos Ayres. By the written instructions given the supercargo on this voyage, he was authorized to sell the vessel to the government of Buenos Ayres, if he could obtain a suitable price. She duly arrived at Buenos Ayres, having exercised no act of hostility, but sailed under the protection of the American flag, during the voyage. At Buenos Ayres, the vessel was sold to Captain Chaytor and two other persons; and soon afterwards she assumed the flag and character of a public ship, and was understood by the crew to have been sold to the government of Buenos Ayres; and Captain Chaytor made known these facts to the crew, and asserted that he had become a citizen of Buenos Ayres; and had received a commission to command the vessel as a national ship; and invited the crew to enlist in the service; and the greater part of them accordingly enlisted. From this period, which was in May, 1816, the public functionaries of our own and other foreign governments at that port, considered the vessel as a public ship of war, and such was her avowed character and reputation. No bill of sale of the vessel to the government of Buenos Ayres is produced, and a question has



been made principally from this defect in the evidence, whether her character as a public ship is established. It is not understood that any doubt is expressed as to the genuineness of Captain Chaytor's commission, nor as to the competency of the other proofs in the cause introduced, to corroborate it. The only point is, whether, supposing them true, they afford satisfactory evidence of her public character. We are of opinion that they do. In general, the commission of a public ship, signed by the proper authorities of the nation to which she belongs, is complete proof of her national character. A bill of sale is not necessary to be produced. Nor will the courts of a foreign country inquire into the means by which the title to the property has been acquired. It would be to exert the right of examining into the validity of the acts of the foreign sovereign, and to sit in judgment upon them in cases where he has not conceded the jurisdiction, and where it would be inconsistent with his own supremacy. The commission, therefore, of a public ship, when duly authenticated, so far at least as foreign courts are concerned, imports absolute verity, and the title is not examinable. The property must be taken to be fully acquired, and cannot be controverted. This has been the settled practice between nations; and it is a rule founded in public convenience and policy, and cannot be broken in upon, without endangering the peace and repose, as well of neutral as of belligerent sovereigns. The commission in the present case is not expressed in the most unequivocal terms; but its fair purport and interpretation must be deemed to apply to a public ship of the government. If we add to this the corroborative testimony of our own and the British consul at Buenos Ayres, as well as that of private citizens, to the notoriety of her claim of a public character; and her admission into our own ports as a public ship, with the immunities and privi-

leges belonging to such ship, with the express approbation of our own government, it does not seem too much to assert, whatever may be the private suspicion of a lurking American interest, that she must be judicially held to be a public ship of the country whose commission she bears.

There is another objection urged against the admission of this vessel to the privileges and immunities of a public ship, which may as well be disposed of in connection with the question already considered. It is, that Buenos Ayres has not yet been acknowledged as a sovereign independent government by the executive or legislature of the United States, and therefore is not entitled to have her ships of war recognized by our courts as national ships. We have, in former cases, had occasion to express our opinion on this point. The government of the United States has recognized the existence of a civil war between Spain and her colonies, and has avowed a determination to remain neutral between the parties and to allow to each the same rights of asylum and hospitality and intercourse. Each party is, therefore, deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war, and entitled to be respected in the exercise of those rights. We cannot interfere to the prejudice of either belligerent without making ourselves a party to the contest, and departing from the posture of neutrality. All captures made by each must be considered as having the same validity, and all the immunities which may be claimed by public ships in our ports, under the law of nations, must be recognized by our courts of justice, until Congress shall prescribe a different rule. This is the doctrine heretofore asserted by this court, and we see no reason to depart from it.

The next question growing out of this record is, whether the property in controversy was captured in violation of our neutrality, so that restitution ought, by the law of nations, to be decreed to the libellants. Two grounds are

relied upon to justify restitution: 1. That The Independencia and Altravida were originally equipped, armed, and manned as vessels of war in our ports. 2. That there was an illegal augmentation of the force of The Independencia within our ports. Are these grounds, or either of them, sustained by the evidence?

The question, as to the original illegal armament and outfit of the Independencia, may be dismissed in a few words. It is apparent, that though equipped as a vessel of war, she was sent to Buenos Ayres on a commercial adventure, contraband, indeed, but in no shape violating our laws or our national neutrality. If captured by a Spanish ship of war during the voyage, she would have been justly condemnable as good prize, for being engaged in a traffic prohibited by the law of nations. But there is nothing in our laws, or in the law of nations, that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit; and which only exposes the persons engaged in it to the penalty of confiscation. Supposing, therefore, the voyage to have been for commercial purposes, and the sale at Buenos Ayres to have been a *bona fide* sale, (and there is nothing in the evidence before us to contradict it,) and there is no pretense to say that the original outfit on the voyage was illegal, or that a capture made after the sale was, for that cause alone, invalid.

The more material consideration is as to the augmentation of her force in the United States, at a subsequent period. The court is, therefore, driven to the conclusion, that there was an illegal augmentation of the force of The Independencia in our ports, by a substantial increase of her crew; and this renders it wholly unnecessary to enter into an investigation of the question, whether there was not also an illegal increase of her armament.

What, then, are the consequences which the law attaches to such conduct, so far as they respect the property now under adjudication? It has never been held by this court that an augmentation of force or illegal outfit affected any captures made after the original cruise was terminated. By analogy to other cases of violations of public law, the offense may well be deemed to be deposited at the termination of the voyage, and not to affect future transactions. But as to captures made during the cruise, the doctrine of this court has long established that such illegal augmentation is a violation of the law of nations, as well as of our municipal laws, and as a violation of our neutrality, by analogy to other cases, it infects the captures subsequently made with the character of torts, and justifies and requires a restitution to the parties who have been injured by such misconduct. It does not lie in the mouth of wrong-doers to set up a title derived from a violation of our neutrality. The cases in which this doctrine has been recognized and applied have been cited at the bar, and are so numerous and so uniform, that it would be a waste of time to discuss them, or to examine the reasoning by which they are supported. More especially as no inclination exists on the part of the court to question the soundness of these decisions. If, indeed, the question was entirely new, it would deserve very grave consideration, whether a claim founded on a violation of our neutral jurisdiction could be asserted by private persons, or in any other manner than by direct intervention of the government itself. In the case of a capture made within a neutral territorial jurisdiction, it is well settled that, as between the captors and the captured, the question can never be litigated. It can arise only upon a claim of the neutral sovereign asserted in his own courts or the courts of the power having cognizance of the capture itself for the purpose of prize. And by analogy to this course of proceed-

ing, the interposition of our own government might seem fit to have been required before cognizance of the wrong could be taken by our courts. But the practice from the beginning in this class of causes, a period of nearly thirty years, has been uniformly the other way; and it is now too late to disturb it. If any inconvenience should grow out of it, from reasons of state policy or executive discretion, it is competent for Congress to apply, at its pleasure, the proper remedy.

It is further contended by the claimant, that the doctrine heretofore established has been confined to cases of captures made by privateers; and that has never been applied to captures by public ships, and in reason and policy ought not to be so applied. The case of *The Cassius*, in 3 D. 121, has been supposed at the bar to authorize such an interpretation of the doctrine. That was the case of a motion for a prohibition to the district court to prohibit it from exercising jurisdiction on a libel filed against *The Cassius*, a public armed ship of France, to obtain compensation in damages *in rem*, for an asserted illegal capture of another vessel belonging to the libellants on the high seas, and sending her into a French port for adjudication, as prize. The libel alleged that *The Cassius* was originally equipped and fitted for war in a port of the United States contrary to our laws, and the law of nations. But there was no allegation that she had been originally fitted out by her present commander, or after she became the property of the French government. The principal question was, whether courts could sustain a libel for compensation *in rem* against the capturing vessel for an asserted illegal capture as prize on the high seas, when the prize was not brought into our ports, but was carried into a port *infra praesidia* of the captors. The court granted the prohibition; but as no reasons were assigned for the judgment, the only grounds that can be gathered, is that

which is apparent on the face of the writ of prohibition, where it is distinctly asserted, that the jurisdiction in cases of this nature exclusively belongs to the courts of the capturing power, and that neither the public ships of a nation, nor the officers of such ships, are liable to be arrested to answer for such captures in any neutral court. The doctrine of that case was fully recognized by this court in the case of *The Invincible*, 1 W. 238; and it furnishes a rule for the exemption of a public ship from proceeding *in rem*, in our courts for illegal captures on high seas, in violation of our neutrality; but in no degree exempts her prizes in our ports from the ample exercise of our jurisdiction.

Nor is there in reason or in policy any ground for a distinction between captures in violation of our neutrality by public ships, and by privateers. In each case the injury done to our friend is the same; in each the illegality of the capture is the same; in each the duty of the neutral is equally strong to assert its own rights, and to preserve its own good faith, and to take from the wrong-doer the property he has unjustly acquired, and reinstating the other party in his title and possession which have been tortiously divested. This very point was directly asserted by this court in its judgment in the causes of *The Invincible*. Mr. Justice Johnson there said: "As to the restitution of prizes made in violation of neutrality, there could be no reason suggested for creating a distinction between the national and the private armed vessels of a belligerent. Whilst a neutral yields to other nations the unobstructed exercise of their sovereign or belligerent rights, her own dignity and security require of her the vindication of her own neutrality, and of her sovereign right to remain the peaceable and impartial spectator of the war. As to her, it is immaterial in whom the property of the offending vessel is vested. The commission under

which the captors act is the same, and that alone communicates the right of capture, even to a vessel which is national property." We are satisfied of the correctness of this doctrine, and have no disposition to shake it. In cases of violation of neutral territorial jurisdiction, no distinction has ever been made between the capture of public and private armed ships; and the same reason which governs that, applies with equal force to this case.

## CHAPTER II.

### CONTRABAND.

Increasing im-  
portance of the  
subject.

With the increased importance of naval warfare as a factor in determining the supremacy of nations, and this is one of the great facts in modern history, it is but natural that the question of contraband should have acquired a position of increased importance in international law. Nor is there any convincing evidence that sea power will in the future become any less of a factor in deciding the fate of nations than it is to-day. In fact the events and tendencies of the past century lead almost irresistibly to the conclusion that the great powers of the future will be sea powers. The one weak point in Napoleon's campaign for supremacy over Europe was his utter inability to cope with England upon the sea. The fate of the Civil War was in large part decided by the American navy. The work of Dewey and Schley forced Spain upon her knees before the United States and rendered unnecessary any severe test between the armies of the two states. If further evidence of the decisiveness of naval supremacy were necessary, that evidence was furnished by the Russo-Japanese war. Had Russia triumphed on sea, the successes of the Japanese armies would have been but temporary incidents in the war which would have ended in the relegation of Japan to a subordinate position among the nations. Such being the increased and increasing importance of sea power, it is evident that the question of the rights of belligerent armed vessels upon the sea must subtend a wider angle in the field of international law. And what is true of their rights as a whole is also true of the phase of the question which has to do with their right



to intercept certain forms of property being carried by sea to their enemy.

Though the term contraband is of relatively recent origin, as it was used for the first time in the sense in which it is now used in international law, rather than to designate a prohibited domestic trade in monopolies in time of peace, in the Treaty of Southhampton, 1625, between England and Holland, the prohibition against neutrals carrying munitions of war to one's enemy was known even to the ancients. According to Grotius, the Greeks and Romans considered the conveyance of arms to either of the belligerents as inconsistent with non-participation in the war. Nor is this at all strange, for it requires no legal refinements to reach the conclusion that if I deprive my enemy of his sword or gun, the man who furnishes him with another weapon is not neutral in the fight.

First use of the term.

That the belligerent did not have the right to prohibit all commerce between a neutral and the state or states with which he might be at war has always been recognized; it has also been recognized that not all commerce was upon the same basis and that certain forms of it are of such a nature that they are subject to certain limitations in favor of the belligerent. Thus a compromise was reached, the terms of which are to be found in the rules governing contraband and blockade. These will be discussed in this and the succeeding chapter.

Compromise limiting neutral's freedom of trade with belligerents.

For the purposes of determining what goods fall under the head of contraband, goods are divided into three classes: (1) Such as are of use only in war; (2) Such as are of use only in peace, and (3) Such as are of use in war and in peace, these are termed *ancipitis usus*. This is the classification made by Grotius, and it has never been improved upon. His achievement is the more remarkable when we consider that he lived in an age of land,

Classification of contraband goods.

not naval, warfare; and, though the question of contraband is not entirely confined to naval warfare, it has never been considered of very great importance except in connection with it.

**Absolute contraband.**

With reference to the first of these classes there is little room for controversy. Goods that are of use only in war, or intended primarily for use in war, are contraband, though they may be incidentally in peace. Such are by common consent placed in the category of absolute contraband. Inventions may change the form and effectiveness of such articles, but the general principle remains the same. This may be illustrated by a comparison of the list of contraband contained in the Treaty of Utrecht with that contained in the Russian proclamation at the beginning of their recent war. In the former we find the following: "arms, cannon, hand-guns, mortars, petards, bombs, grenades, gun-carriages, forks, bandoleers, cannon-powder, saltpeter, balls, pikes, espees, morions, cercles-poisseez, helmets, cuirasses, halberds, javelins, pistol-bags, baldrics, horses with their harness, etc." The Russian proclamation includes: "arms, munitions, explosives, and substances used for manufacture of explosives; materials used for artillery, engineering, and baggage trains, such as gun-carriages, campaign kitchens, carts, barbed wire, pontoons, harness, etc., articles of military equipment and clothing, ships constructed for purposes of war, boilers, and all kinds of combustibles, such as coal, naphtha, alcohol and similar substances; materials for telegraphic and telephonic installations, or for construction of railways generally; all objects intended for war on sea or land, including rice, provisions, horses, etc."

**The second class.**

With reference to the second class, there has never been any conflict in opinion or practice, goods of this class are universally considered as outside the realm of contraband. So that if the neutral cares to convey to either belligerent

such articles as pianos, books on theology, etiquette, or belles letters, paintings, laces and embroidery, all forms of ladies' attire, etc., the other belligerent offers no objection and has no right to interfere with this kind of neutral trade. To cut off such trade would be to injure the neutral, without any corresponding advantage to the belligerent. It would therefore be without justification or excuse. The rule as to this class is so well recognized and rests upon so clear a reason that it is unnecessary to spend further time in discussing it.

The only real difficulty arises with reference to the third class, and it is with reference to this class that practically all of the disputes have arisen. And, indeed, if articles *incipitis usus* are to be considered contraband at all, it is not in the least surprising that the circumstances under which they should be so considered should give rise to differences of opinion and thus become a prolific source of disputes. Nor is it more surprising that, upon a question which is mainly commercial, as this question undoubtedly is, the view taken should be deeply tinged with the hue of national interests. Hence we find that a nation having a strong navy is likely to view favorably an increase of the list of contraband goods by placing a number of the articles of this class in the list of absolute contraband; that a nation producing a large number of horses for export is likely to oppose including horses in the list of absolute contraband; and that even the same nation is inclined to take a somewhat different view of what should be included in the list of contraband when it is a belligerent to that which it may have held when it was a neutral. Articles of this class may therefore be either absolute contraband or conditional contraband. Where certain of them are placed in the former category by treaty, no difficulty arises. But, apart from treaty, there is doubt as to whether such articles as pitch, ship timber, horses, etc.,

Articles *incipitis usus*.

Are such articles absolute or conditional contraband.

should be considered as absolute, or as conditional contraband, i. e., contraband according to circumstances. The divergent theory and practice with reference to this we will now consider.

Views of  
Grotius.

With reference to articles *ancipitis usus*, Grotius says: "And as to articles of the third class, from their being a doubtful kind, a distinction must be made between the times of war and peace. For if a power cannot defend itself, but by intercepting the supplies sent to an enemy, necessity will justify the step, but upon condition of making restoration, unless there be some additional reasons to the contrary. But if the conveyance of goods to an enemy tends to obstruct any belligerent power in the prosecution of a lawful right, and the person so conveying them possesses the means of knowing it; if that power, for instance, is besieging a town, or blockading a port, in expectation of a speedy surrender and a peace, the person, who furnishes the enemy with supplies, and the means of prolonged resistance, will be guilty of an aggression and injury towards the power. He will incur the same guilt, as a person would do by assisting a debtor to escape from prison, and thereby to defraud his creditor. His goods may be taken by way of indemnity, and in discharge of the debt. If the person has not yet committed the injury, but only intended to do so, the aggrieved power will have a right to detain his goods, in order to compel him to give future security, either by putting into his hand hostages, or pledges; or indeed in any other way. But if there are evident proofs of injustice in an enemy's conduct the person who supports him in such a case, by furnishing him with succors, will be guilty not barely of a civil injury, but his giving assistance will amount to a crime as enormous, as it would be to rescue a criminal in the very face of the judge. And on that account the injured power

may proceed against him as a criminal, and punish him by a confiscation of his goods.

“We are informed by Polybius, in his first book, that the Carthaginians seized some of the Romans, who were carrying supplies to their enemies, though they afterwards gave them up, upon the demand of the Romans. Plutarch says that when Demetrius had invested Attica, and taken the neighboring towns of Eleusis and Rhamnus, he ordered the master and pilot of a ship, attempting to convey provisions into Athens, to be hanged, as he designed to reduce that city by famine; this act of rigor deterred others from doing the same, and by that means he made himself master of the city.”

Though this is a recognition of the principle of conditional contraband, it furnishes us no definite test as to when the principle is to be applied or what articles are to be included within this category. The justness or unjustness of the war is certainly no longer a legal test. The unjustness of the war may warrant intervention, but while a state remains neutral its rights of trade with either belligerent must be determined irrespective of the question of justice or injustice of the war.

Bynkershoek adds little if anything to what had been contributed by Grotius. He concludes that articles do not belong in the list of absolute contraband unless they are either “war-like instruments or material *per se* fitted for war.” (*Quaestiones Juris Publici*, Ch. X.) And that this must be determined irrespective of their uses outside of war. The material out of which warlike instruments is made was by him excluded from the list of absolute contraband. His reason for this was that the opposite rule would result in the inclusion of most articles of commerce. His position in this particular was not then and is not now in accord with international law. For instance, saltpetre has, ever since the invention of gunpowder, always been

Bynkershoek  
almost equally  
vague.

included in the list of absolute contraband; and most of the treaties which deal with the subject of contraband include ship-timbers, pitch, tar, etc., in the list of absolute contraband.

Vattel.

Vattel also gives but a very limited enumeration and a very vague test of what goods are contraband. He says: "Commodities particularly useful in war, and the importation of which to an enemy is prohibited, are called contraband goods. Such are arms, ammunition, timber for ship-building, every kind of naval stores, horses, — and even provisions, in certain junctures, when we have hopes of reducing the enemy by famine." (Law of Nations, Bk. III, Sec. 112.) This is a recognition of the principle that, with reference to articles of the third class, the state or condition of the war must be taken into consideration in determining the question of contraband. It will be observed, however, that he placed some articles *ancipitis usus* in the list of absolute contraband, *e. g.* horses, timber for ship-building; and that he gives us but an extremely indefinite test for determining when the doctrine of occasional contraband is to be applied.

Dispute during  
Napoleonic  
wars.

The doctrine of occasional contraband was not pressed very vigorously previous to the Napoleonic wars. At that time, England, having control of the sea, insisted that as France had armed nearly her entire adult male population she could be reduced by famine, provided neutral trade with France were cut off, and that under the peculiar circumstances this was a lawful measure. Her pretensions were contrary to the generally accepted principles of international law and were vigorously resented by the neutral nations, but neutrals were at that time in the minority and the claims of the belligerents were enforced. It is therefore within practically the last century that this doctrine has assumed much practical importance in international law, and

a serious attempt has been made to formulate rules governing its application.

With reference to "naval stores," it cannot be said that they have been universally considered as absolute contraband, though it is perhaps true that they have usually been so considered. The divergence in usage upon this point is well illustrated by a dispute which arose between the United States and Spain over the fact that in a treaty between them "naval stores" were excluded from the list of contraband, while in a treaty between the former and England they were included in the list of contraband. Replying to the protest of Spain, our Secretary of State said: "Naval stores are by the law of nations contraband of war. Permit me to say, that our engagement with Great Britain ought to be no matter of surprise to the Catholic King; because His Majesty has seen, during the whole course of the American war, how steadily Great Britain persisted, in opposition to the demands of all the Maritime Powers, to maintain her claims under the law of nations to capture enemy's property, and timber, and naval stores, as contraband in neutral ships. Could His Catholic Majesty, therefore, expect Great Britain would relinquish her legal rights to a nation which abounded in materials for building and equipping ships?" The French courts have held them not to be contraband, while the British and American courts have taken the opposite view. Notwithstanding the conflicts both in treaties and in court decisions, it is safe to say that at the present time they belong in the list of occasional not absolute contraband.

It needs no argument to prove that warships are absolutely contraband of war. Therefore, when such are sold to belligerents by the citizens of a neutral state, they are subject to capture and confiscation when seized by the other belligerent. We have already called attention to the fact that it is a generally recognized duty of a neutral

state to refrain from selling warships to a belligerent, but it is not under obligation to prevent its citizens from so doing. In either case, however, a doubt may arise, and has occasionally arisen, as to the real character of the vessel. Of such ambiguous character was *The Fanny* (5 Robinson's Admiralty Reports, 370), which, though condemned by the Vice Admiralty Court of the Bahamas, was restored by the Court of Appeal. But in the case of *The Brutus* (*Ibid.*), in which the same question was raised, the court decided "that as she was built for purposes of war and not for peace and was going to be sold to the enemy" the vessel was contraband of war and ought to be condemned. The Lords of Appeal affirmed the sentence. Merchant ships are not contraband, unless they are being sent to the enemy for use as transports or for other warlike purposes.

#### Horses.

Horses have in a great many treaties been included in the list of absolute contraband. In fact the only country that has persistently refused to so consider them in her treaties is Russia. The United States has at times included them in the list of absolute contraband and at times has refused to do so. They were included in the list of absolute contraband by the *Ordonnance de la Marine* and have ever since been so considered by France and Great Britain. Chancellor Kent concludes that such "is doubtless the general rule." (Commentaries, Vol. I, p. 136.) In the recent Russo-Japanese war, they were classed by the Japanese as conditional contraband. But Russia, having seen a new light, classed them as absolute contraband.

#### Coal.

Since coal has become indispensable in naval warfare, it is but natural that the necessity of restricting trade in it between neutrals and belligerents should have been recognized. As early as the Treaty of Utrecht it was placed in the list of conditional contraband. Now, the only question is whether it should be in the list of absolute or of conditional contraband. Though France refused to admit the



correctness of the claim, Count Bismarck insisted, during the Franco-Prussian war, that coal was contraband. In 1873, Lord Chief Justice Cockburn advised his government that "coal, too, though in its nature *ancipitis usus*, yet when intended to contribute to the motive power of a vessel, must, I think, as well as machinery, be placed in the same category as masts and sails, which have always been placed among articles of contraband". (Parl. Papers, 1873, N. America, p. 15.) That no universal agreement has yet been reached is shown by the fact that by the declarations of the Russo-Japanese war, coal was placed by Japan in the list of conditional contraband and by Russia in that of absolute contraband. Such action upon the part of Russia is not a little surprising in view of her declaration at the West African Conference, 1884, in which she "Took occasion to dissent vigorously from the inclusion of coal among articles of contraband of war, and declared that she would categorically refuse her consent to any articles in any treaty, convocation or instrument whatever which would imply its recognition as such." (Parl. Papers, 1885, p. 132, Africa.) With reference to a material of such vital importance as is coal, it is unfortunate that no definite agreement has been reached, so that a given nation could not bind the others by selecting whichever rule might suit its purposes best. It would seem that the placing of coal in the category of conditional contraband furnishes sufficient protection to the belligerent, and, if so, the right of neutrals to freedom of commerce is an ample reason for not allowing it to be placed in the list of absolute contraband.

The tendency upon the part of Russia to extend the list of absolute contraband is shown by her placing cotton in the list of absolute contraband. Of this, Mr. T. E. <sup>Cotton.</sup> Holland says: "Still more unwarrantable is the Russian claim to interfere with raw cotton. Her prohibition of this

trade is wholly unprecedented, for the treatment of cotton during the American Civil War will be found upon examination to have no bearing upon the question under consideration." During that war, cotton was considered contraband, because "it was the basis upon which the operations of the Confederacy rested." Such was in no wise the case with Japan. The peculiar circumstances making cotton contraband during the Civil War have been well stated by Mr. Bayard in a letter to Mr. Murnaya, June 28, 1886. "Cotton was useful as collateral security for loans negotiated abroad by the Confederate government, or was sold by it for cash to meet current expenses, or to purchase arms or munitions of war. Its use for such purposes was publicly proclaimed, and its sale interdicted, except under regulations established by, or under contract with, the Confederate government. Cotton in fact was to the Confederacy as much munitions of war as powder and ball, for it furnished the chief means of obtaining these indispensables of warfare." There is a further marked difference between the two cases, namely, in the first the cotton was the product of the enemy country, while in the latter it was the product of neutral countries, chiefly the United States. The consideration shown to goods which are the produce of the neutral country exporting them is set forth by Lord Stowell in the case of *The Twee Juffrowen*. (4 Robinson's Admiralty Reports, 200.)

**Provisions.**

As the place of provisions in the category of contraband has occasioned so much dispute and the practice has varied so widely, it will be well to consider at considerable length the precedents, treaties, opinions of text-writers, and the decisions of courts upon the subject.

**Precedents.**

In 1559, Queen Elizabeth would not allow the Poles and Danes to furnish Spain with provisions, alleging that "according to the rules of war, it is lawful to reduce an enemy even by famine, with the view of obliging him to

sue for peace." In other words, nations are to be starved into their senses. In 1625, Charles I. issued a proclamation notifying "all manner of persons of all conditions that shall send or come into Spain, Portugal, Burgundy, or any other of the said King of Spain's countries, or dominions, any manner of grain or other victuals the same shall be seized by His Majesty's ships and the goods duly forfeited for the benefit of His Majesty." In 1646, the United Provinces published an edict prohibiting neutral nations from carrying either provisions or any other merchandise to Spain, because the Spaniards "after having, under the appearance of commerce, allured foreign vessels to their ports, detained them and made use of them as war ships." From the fact that they felt it necessary to offer an excuse for their action, it will readily be inferred that this was not in accord with the law of nations as understood at that time.

In 1793, the French convention declared "that cargoes of neutral ships consisting of grain and destined for a hostile port, might be seized for the use of France" on the principle of preëmption, thus giving assent to the doctrine of occasional contraband, or contraband according to circumstances. This doctrine received its widest extension in the war of England against revolutionary France. The British representative to our government claimed that by the law of nations all provisions were to be considered contraband in the case where the depriving the enemy of supplies was one of the means employed to reduce him to reasonable terms of peace; and that the actual situation of France was such as to lead to that mode of distressing her, inasmuch as she had armed almost all of the laboring class of people, for the purpose of supporting hostilities against all the governments of Europe.

In 1885, the doctrine was revived to its fullest extent by France during her hostilities with China by declaring

shipments of rice to any ports north of Canton to be contraband of war. The pretension was resisted by Great Britain on the ground that, though in particular circumstances provisions may acquire a contraband character, they cannot in general be so treated. In answer, the French government alleged that a special circumstance of such kind as to justify its action was supplied by the fact of the importance of rice in feeding the Chinese population as well as of the Chinese armies; thus advancing the untenable doctrine that articles become contraband not only by their importance in military and naval operations, but also by the degree in which interference with their supply will put stress upon the non-combatant population. Lord Granville on behalf of the British government, promptly notified France that his government would not consider itself bound by the decision of any prize court which would give effect to the doctrine put forward by France. In commenting upon Lord Granville's attitude in this case, Holtzendorff says: "Man kann Lord Granville nur dankbar sein, dass er das gute Recht der Neutralen so entschieden gegen französische Willkür vertheidigt hat." Fortunately or unfortunately, no opportunity was afforded for learning whether the French courts would have upheld the views of the political branch of their government, as no seizure was made during the remainder of the war; shipments of rice, it would seem, were entirely stopped by fear of capture.

During the Boer war, a cargo of flour belonging to citizens of the United States and shipped to citizens of the Transvaal was seized by the British in Delagoa Bay and treated as conditional contraband. By its declaration of February, 1904, Russia included provisions in the list of absolute contraband. Concerning this declaration, Lord Lansdowne, the British Secretary for Foreign Affairs, said: "We took up, in particular, the inclusion amongst

articles unconditionally contraband of war of provisions, in which I need not say this country is very largely interested. We pointed out that the inclusion of all provisions in this category was a very serious innovation, and we added to our despatch a statement that we felt bound to reserve our rights by protesting at once against the doctrine that it is for the belligerent to decide, that certain articles are, as a matter of course, and without reference to other considerations, to be dealt with as contraband of war, regardless of the well-established rights of neutrals."

In its protest the United States took the position that "articles which, like arms and ammunition, are by their nature of self-evident warlike use are contraband of war, if destined to the enemy's territory; but articles which, though of ordinarily innocent, are capable of warlike, use are not subject to capture and confiscation unless shown by sufficient evidence to be destined to the military or naval forces of a belligerent."

On September 26, 1904, the political branch of the Russian government consented to placing provisions in the list of conditional contraband. But the Prize Court at Vladivostok made this concession of no practical effect by a ruling that, in order to avoid the penalty of confiscation, the owner of the provisions must prove that they would not be used by the army or navy of the enemy. Such proof would, except in rare cases, be impossible; as, unless the owner intended to eat them all himself, he would very probably sell them, and once he had sold them, they would be out of his power of control and might readily find their way to the enemy's army or navy. This ruling was very correctly characterized by Secretary Hay as "a declaration of war against commerce of every description between the people of a neutral and those of a belligerent State." To assume that an act which is ordinarily innocent is a guilty

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act and then require the actor to prove the contrary may not grate upon the juristic sense of some people but it does upon that of others. And, fortunately, these latter are in the majority.

**Treaties.**

The more important treaties on the subject are those made between Great Britain on the one side and Russia, Spain, Portugal, and Austria, on the other, which restricted the "conveyance from their respective ports into France of naval and military stores and provisions, whether cereal grains, salt fish, or other articles." The purpose of these was clearly to starve sense into France. England and the United Provinces having agreed in the Treaty of Whitehall, signed on August 22, 1689, to notify all States not at war with France that they would attack any ship bound to or coming from any port of that kingdom, and that they beforehand declared every such ship to be lawful prize. Sweden and Denmark, from whom some ships had been taken, entered into a counter-treaty in 1693, for the purpose of maintaining their rights and procuring just satisfaction, and the two maritime powers, being convinced that the complaints of the two Crowns were well founded, did them justice.

As between Great Britain and the United States, the Treaty of 1794, better known as Jay's Treaty, contains an admission that provisions and other articles not generally contraband might become such according to the existing law of nations, but provides that if seized they shall be paid for, or, in other words, allows, as between the contracting parties, of the practice of preëmption. We quote the following from Art. XVIII of the Treaty: —

"Whereas the difficulty of agreeing on the precise cases in which provisions and other articles of contraband may be regarded as such, renders it expedient to provide against the inconveniences and misunderstandings which might thence arise, \* \* \* whenever any such articles so

becoming contraband according to the existing law of nations shall for that reason be seized, \* \* \* the captors, or, in their default, the government under whose authority they act, shall pay the full value, with a reasonable mercantile profit thereon, together with the freight, and also the damages incident to such detention."

The difficulty with this treaty is that the expression "becoming contraband according to the existing law of nations" is not defined in the treaty, but is left an open question; and here, as often happens in international law, there is by no means unanimity of agreement as to the construction of terms.

Ortolan, Hautefeuille, Kleen — in fact the whole school of French writers on international law insist that provisions cannot be considered as contraband. Wheaton seems to think that provisions can only be contraband when sent to ports actually besieged or blockaded, and Bluntschli declares that this is undoubtedly the case.

Calvo, the great Swiss international law writer, says, in the last edition of his work, that, "we believe it an established principle that commerce in eatables (*denrees alimentaires*) remains essentially free in times of war."

Hall, the greatest English international law writer, says: —

"The topic of the admissibility of provisions in general to the list of contraband of war may be put aside as one which is not open to serious argument. Further than this it cannot be doubted for a moment, not only that the detention of provisions bound even to a port of naval equipment is authorized by usage, but that it is unjustifiable in theory. To divert food from a large population when no immediate military end is to be served, because it may possibly be intended to form a portion of supplies, would be to put a stop to all neutral trade in innocent articles. But writers have been satisfied with a broad statement of

principle, and they have overlooked an exceptional and no doubt rare case, in which, as it would seem, provisions may fairly be detained or confiscated. If supplies are consigned directly to an enemy's fleet, or if they are sent to a port where the fleet is lying, they being in the latter case such as would be required by ships and not ordinary articles of import into the port of consignment, their capture produces an analogous effect to that of commissariat trains in the rear of an army. Detention of provisions is almost always unjustifiable simply because no certainty can be arrived at as to the use which will be made of them; so soon as certainty is in fact established, they, and everything else which directly and to an important degree contributes to make an armed force mobile, become rightly liable to seizure. They are not less noxious than arms; but except in a particular juncture of circumstances their noxiousness cannot be proved."

**Decisions of  
courts.**

The decisions of the courts are more or less conflicting, the French courts taking the view that provisions are in no case to be treated as contraband. The English courts have held the opposite view. In 1673 it was expressly asserted by Sir B. Wiseman, the King's advocate, upon a formal reference to him, that by practice of the English Admiralty corn, wine, and oils were liable to be deemed contraband. "'I do agree,' says he, reprobating the regulation that had been published and observing that rules are not to be so hardly laid down as to press upon neutrals, 'that corn, wine, and oil will be deemed contraband.'"

In 1747, in the *Jonge Andreas*, butter going to Rochelle was condemned. Salted cod and salmon were condemned as contraband in the *Jonge Frederick*, going to Rochelle in the same year. In 1748, in the *Joannes*, rice and salted herrings were condemned as contraband. In the *Jonge Margaretha*, 1799, the High Court of Admiralty, in a judgment given by Sir W. Scott, England's greatest



Admiralty judge, it was decided that a cargo of cheese captured on a voyage from Amsterdam to Brest was contraband. After adverting to the fact, that was notorious to all Europe at this time, that there was, in the port of Brest, a considerable French fleet in a state of preparation for sallying forth on a hostile expedition; and that the cheeses were such as were exclusively used on French ships of war; in support of the decision he states in his opinion that: —

“ The most important distinction is whether the articles were intended for the ordinary use of life or even for mercantile ships’ use, or whether they were going with a highly probable destination to military use? Of the matter of fact on which the distinction is to be applied, the nature and quality of the port to which the articles were going is not an irrational test: if the port is a general commercial port, it shall be understood that the articles were going for civil use, although occasionally a frigate or other ships of war may be constructed in that port. *Contra*, if the great predominant character of the port be that of a port of naval military equipment, it shall be intended that the articles were going for military use, although merchant ships resort to the same place and although it is not impossible that the articles might have been applied to civil consumption; for it being impossible to ascertain the final use of an article *incipitis usus*, it is not an injurious rule which deduces both ways the final use from the immediate destination; and the presumption of a hostile use, founded on its destination to a military port, is very much inflamed, if, at the time the articles were going, a considerable armament was notoriously preparing, to which a supply of these articles would be eminently useful.”

In the case of the *Commercen*, it was decided by the

Supreme Court of the United States, Justice Story delivering the opinion, that:—

“By the modern law of nations, provisions are not, in general, deemed contraband, but they may become so, although the property of a neutral, on account of the particular situation of the war, or on account of their destination. If destined for the ordinary use of life in the enemy's country, they are not in general contraband; but it is otherwise if destined for military use. Hence, if destined for the army or navy of the enemy, or for his ports of naval or military equipment, they are deemed contraband.”

The facts in this case are that a Swedish vessel was captured on April 16, 1814, by the private armed schooner *Lawrence*, on a voyage from Limerick in Ireland to Bilboa in Spain. The cargo consisted of barley and oats, the property of British subjects, the exportation of which is generally prohibited by the British government; and as well by the official papers of the Custom House as by the private letters of the shippers, it appears to have been shipped under the special permission of his Britannic Majesty's forces then in Spain. The goods were declared contraband.

In the case of *The Peterhoff*, it was decided by the Supreme Court of the United States in 1866, that non-contraband goods belonging to the owner of contraband on board the same ship are subject to confiscation.

Chief Justice Chase, in delivering the opinion of the court said:—

“The classification of goods as contraband or not contraband has much perplexed text-writers and jurists. A strictly accurate and satisfactory classification is perhaps impracticable; but that which is best supported by American and English decisions may be said to divide all merchandise into three classes. The first consists of articles

manufactured and primarily and ordinarily used for military purposes in the time of war; the second, of articles which may be and are used for purposes of war and peace, according to circumstances; and the third, of articles exclusively used for peace purposes. Merchandise of the third class is contraband only when actually destined to the military or naval use of the belligerents."

In the case of *The Calchas*, flour shipped from Tacoma to Ports in Japan was confiscated by the Vladivostock Prize Court. That is to say it was treated as absolute not conditional contraband. The decision of the Vladivostock Prize Court was, upon this point, confirmed by the Supreme Prize Court at St. Petersburg, June 14, 1905. In the case of *The Cheltenham*, beer shipped from England to Korea was confiscated by the Vladivostock Prize Court and the decision was confirmed by the Supreme Naval Prize Court at St. Petersburg. It may be worth while calling attention to the fact that the destination was in this case legally neutral; for even if Korea were a protectorate of Japan, it does not necessarily follow from that that she was at war with Russia.

From the above precedents, treaties, opinions of text-writers and decisions of courts, selected, not because they favor the one side or the other, but because they throw light on the question at issue, we discover a definite tendency toward an increase of neutral rights. This is due partly to the increased ratio of neutral to belligerent trade and partly to a general desire to ameliorate the harsh conditions of war, which has manifested itself in many directions and particularly as regards non-combatants. So that in the present stage of development of international law the weight of authority is clearly against considering provisions as contraband of war; except when there is sufficient evidence that they are going to a besieged place or for the use of the enemy's army or navy, and it is

doubtful if neutrals will ever permit the opposite rule to be revived—the opposition to it on the ground of both sentiment and interest is too strong.

Doctrine of pre-emption.

The doctrine of preëmption has played no small part in the law of contraband. Though by no means a recent doctrine, as it was very common previous to the Treaty of Münster, 1648, in its most important application, viz., as a solution for the question of conditional contraband, it is little more than a century old. When in her war against Revolutionary France, England adopted the policy of cutting off the food supply of France, not feeling warranted in confiscating the cargoes of provisions intercepted by her cruisers, and as she needed them herself, the doctrine of preëmption served her purposes well. In our treaty of 1794 with England, specific provision was made for the application of the doctrine as between the parties to the treaty.

Lord Stowell's observations.

Concerning this doctrine Lord Stowell said in the case of *The Haabet* (2 Robinson's Admiralty Reports, 146), decided in 1800: "The right of taking possession of cargoes of this description, *Commeatus* or provisions, going to the enemy's ports, is no peculiar claim of this country; it belongs generally to belligerent nations; the ancient practice of Europe, or at least of several of the maritime states of Europe, was to confiscate them entirely; a century has not elapsed since this claim has been asserted by some of them. A more mitigated practice has prevailed in later times of holding such cargoes subject only to the right of preëmption, that is, to a right of purchase upon a reasonable compensation to the individual whose property is thus diverted." The rule as to compensation adopted by the English courts was to pay the cost of the goods plus a ten per cent profit. They refused to allow the price to be determined by what might have been obtained had the voyage been completed.

The consistency of this doctrine has been attacked upon the ground that either the neutral has a right to trade with the belligerent in innocent articles or he has not the right. **Inconsistency of doctrine.** If he has the right, then it is unlawful for the belligerent to prevent his exercising it; and if he has not the right, there is no reason why the belligerent should pay him for refraining from exercising it. Apart from treaty providing for it, the application of the doctrine places the belligerent in a contradictory position. For, by insisting upon applying it to neutrals who have not agreed to it by treaty, he forces them to sell to him goods which they have a perfect right to sell to the parties to whom they are shipping them.

Quasi-contraband goods, or, as they are frequently called, analogues of contraband, are very closely related **Quasi contraband.** in some ways to contraband proper but in other respects differ widely. There are usually classed under this head: (1) Military persons of the enemy; (2) Warships; (3) Dispatches.

A neutral vessel which is used for the purposes of carrying persons in the military service of a belligerent brings itself to such an extent into a hostile relation to the other belligerent as to subject itself to the penalty of confiscation, if captured. **Carrying military persons of the enemy.** The number of persons carried is immaterial. The gist of the offense is the injury to the belligerent, and this may be as great where one veteran general is carried as by the carrying of a whole army corps. Nor does it matter that the service is rendered as a result of fraud or duress. If the neutral is imposed upon, he must look to the one who imposed upon him for redress. The basis for this rule is its necessity in order to prevent collusion between neutral individuals and belligerents. It was said by Sir Wm. Scott in the case of *The Caroline* (4 Robinson's Admiralty Reports, 210): "If an act of force, exercised by a belligerent on a neutral ship or

person, is to be deemed sufficient justification for an act done by him, contrary to the known duties of the neutral character, there would be an end of any prohibition under the law of nations to carry contraband, or to engage in any other hostile act. If any loss is sustained in such a service, the neutral yielding to such demands, must seek redress against the government that has imposed the restraint upon him." And in *The Orozembo* (6 Robinson's Admiralty Reports, 430) it was decided that it makes no difference if fraud is substituted for force so that the neutral performs the service unwittingly. This is accepted by Wheaton as a correct statement of the law, and no doubt it is. Yet it seems a very harsh rule. Undoubtedly the presumption should be against the neutral engaged in such a noxious service, but it would seem that if by sufficient evidence he can show that he is free from guilty intent he is not the one to suffer even though he *may* later secure reparation for such suffering. There is room here for modification so as to bring the rule of international law into harmony with that of municipal law, according to which an innocent agent is not compelled to suffer for a tort or crime committed through him.

Carrying diplomatic representatives of belligerents.

Persons in the diplomatic service of the enemy are not to be included in the category of quasi-contraband. Hence, a neutral vessel has a perfect right to carry them even to an enemy port, and the belligerent has no right to interfere, whether by seizing the vessel or removing them. They may of course be made prisoners of war if found in the territory of the belligerent, or within enemy territory, but while in neutral territory or on the high seas in neutral vessels they are inviolable. This question was raised during the Civil War by the seizure of *Mason and Slidell* on *The Trent*, a British steamer. It was urged by the Federal government that they were contraband of war and that as such it had the right to remove them from the British

steamer. This contention was not in accord with the established principles of international law. If such an act could be justified at all, it would have to be justified upon the ground of self-preservation — a doctrine which like the general welfare clause in the Constitution should not be overworked. In yielding to the British demand we went no further than was our duty under international law to go. And yet the contention of Mr. Seward did not lack very respectable British authority upon which to rest, for it had been decided by Lord Stowell that “It is indeed competent to a belligerent to stop the ambassador of his enemy on his passage; but when he has once arrived,” etc. (Phillimore, Vol. III, p. 458.)

Though warships are placed in the class of quasi-contraband by some, they properly belong in the class of absolute **Warships.** contraband; except as regards pilotage by neutrals, there is no excuse for placing them in this class. When a neutral pilots war-vessels of a belligerent he renders a service analogous to that of carrying contraband.

The carriage of dispatches between the government and the military or naval authorities of a belligerent is a service in which the neutral is not permitted to engage. There is the same reason for this as for prohibiting to him the transport of persons in the military or naval service. This does not apply to the ordinary mails between neutral and belligerent countries nor to the dispatches of a belligerent government to its consul resident in a neutral state, nor to **Dispatches.** dispatches by ambassadors to their own governments, as the right of legation implies the right to communicate with their own governments. The act of the Russian volunteer cruisers in stopping the Prinz Heinrich, a German mail steamer, in the Red Sea and taking from her two bags of mail cannot be considered as in accord with international law, nor is it likely that it will be allowed to establish a precedent. Though mail steamers are not exempt from

search, there is a general consensus of opinion that mails received in the ordinary course of business ought not to be interfered with. Upon this point Mr. Hall says: "The secrecy and regularity of postal communication is now so necessary to the intercourse of nations and the interests affected by every detention of a mail are so great that the practical enforcement of the belligerent right would soon become intolerable to neutrals." (International Law, 4th Ed., p. 703.) But the mails received in the ordinary way are a very different thing from documents received from government officials to be delivered to persons in its military or naval service, or vice versa. Concerning the noxiousness of this kind of service, Sir W. Scott said: "The carrying of two or three cargoes of military stores is necessarily an assistance of a limited nature; but in the transmission of dispatches may be conveyed the entire plan of a campaign, that may defeat all the plans of the other belligerent in that quarter of the world."

When knowledge imputed to master of ship carrying dispatches.

The presumption of knowledge upon the part of the neutral master depends upon circumstances. If the voyage begins from a neutral port and is to end at a neutral port or a port of the belligerent which is open to trade, the case is a very different one from that of receiving documents at or to be carried to a hostile port. In the latter case he receives them at his own risk and cannot be heard to say that he is ignorant of a fact with which by due inquiry he might have made himself acquainted. This was the position taken by the Supreme Court of the United States in the case of *The Springbok* (5 Wallace, 1). But where the master of a vessel received in New York, a neutral port, important dispatches which had been brought from Batavia, yet which were handed to him in an ordinary envelope, and by a private person in France, the ship was released on the oath of the captain that he was ignorant of



the contents of the letters which were intrusted to him for purposes of delivery (*The Rapid*, Edwards, 228).

The penalty for carrying contraband varies with the circumstances. The old rule was that not only the goods but the ship conveying them were confiscated. But this rule has been greatly relaxed. As a usual thing the ship is not now confiscated but merely the contraband goods. If, however, these belong to the owner of the vessel, both are forfeited. Also where there is a false destination alleged, or where the owner of the vessel is privy to the carriage of contraband, or there is concealment of the contraband goods, the ship shares the fate of the goods. If the owner of the contraband goods is but part owner of the vessel that part interest only is confiscated.

Penalty for carrying contraband.

Not only do contraband goods contaminate the ship, where both are owned by the same person, but they render liable to confiscation the rest of the cargo, if it is the property of the same person who owns the contraband. But the parts of the cargo which are not contraband are not affected, if owned by persons not interested in the contraband goods. Where the contraband goods are not owned by the owner of the vessel his only loss is the loss of freight and expenses.

Contamination of cargo.

As was said by the Supreme Court in the case of *The Commercen*, the carrying of contraband goods is not unlawful and no other penalty can be inflicted than the losses incident to the trade, viz., loss of freight, goods and in some cases of the ship. Upon this question Chancellor Kent said in the case of *Seton v. Low* (1 Johnson Cases, 1): "I am of opinion, that the contraband goods were lawful goods, and that whatever is not prohibited to be exported, by the positive law of the country, is lawful. It may be said, that the law of nations is part of the municipal law of the land, and that by that law (and which, so far as it concerns the present question, is expressly incor-

Carrying of contraband goods not unlawful.

porated into our treaty of commerce with Great Britain) contraband trade is prohibited to neutrals, and consequently, unlawful. This reasoning is not destitute of force, but the fact is, that the law of nations does not declare the trade to be unlawful. It only authorizes the seizure of the contraband articles by the belligerent powers; and this it does from necessity. A neutral nation has nothing to do with the war, and is under no moral obligation to abandon or abridge its trade; and yet, at the same time, from the law of necessity, as Vattel observes, the powers at-war have a right to seize and confiscate the contraband goods, and this they may do upon the principle of self-defense. The right of the hostile power to seize, this same very moral and correct writer continues to observe, does not destroy the right of the neutral to transport. They are rights which may, at times, reciprocally clash and injure each other. But this collision is the effect of inevitable necessity, and the neutral has no just cause to complain. A trade by a neutral in articles contraband of war, is, therefore, a lawful trade, though a trade, from necessity, subject to inconvenience and loss."

**Penalty in case  
of conditional  
contraband.**

We have thus far been considering the penalty for carrying absolute contraband. In the case of conditional contraband, the above penalties apply, if the goods are destined to the use of the opposing army or fleet, or to a besieged place; but if not and they are seized, under the rule of preëmption the owner of the goods is entitled to the invoice price of the goods plus a reasonable profit.

**Penalty for  
carrying dis-  
patches or  
military  
persons.**

In the case of carrying dispatches it is evident that the mere confiscation of the things carried would be a manifestly inadequate penalty, in fact it would be practically no penalty at all so far as the carrier is concerned. Here the penalty is the confiscation of the ship, except in the case where the master of the vessel is ignorant of the fact that contraband dispatches are carried. It is equally clear that

the appropriate penalty for carrying military persons in the service of the enemy is the confiscation of the ship.

In order to be subject to penalty at all, the ship or articles must be taken *in delicto*. As was said by Lord Stowell in the case of *The Imina* (3 Robinson's Admiralty Reports, 138): "Under the present understanding of the law of nations you cannot generally take the proceeds in the return voyage. From the moment of quitting port to a hostile destination, indeed, the offense is complete, and it is not necessary to wait till the goods are actually endeavoring to enter the enemy's port; but beyond that, if the goods are not taken *in delicto*, and in the actual prosecution of such a voyage, the penalty is not now generally held to attach." Upon the same subject Professor de Martens says: "In order that the seizing of a neutral vessel for conveying contraband may be lawful, it is necessary that the neutral vessel in question should be caught *in flagrante delicto*. Capture subsequent to the discharge of the unlawful cargo is not justifiable in law." This rule, though departed from in the case of *The Nancy* (3 Robinson's Admiralty Reports, 71), and of *The Rosalie and Betty* (2 *Ibid.* 281), has been very generally followed by prize courts. It was disregarded by the Vladivostock Prize Court in the case of *The Allanton*, but this decision was overruled by the Admiralty Council at St. Petersburg. In this case *The Allanton* was held for carrying coal from Muroran to Singapore and for having on a previous voyage during the war carried a full cargo of contraband to Sasebo, an enemy port. There could be no question as to the legality of the voyage she was prosecuting when seized, as the mere suspicion of a false destination, which, as in this case, had no facts upon which to rest, can furnish no ground for condemnation. It is therefore not at all surprising that the Admiralty Council should have ordered the release of the vessel

and cargo, but it is surprising that it did not award costs and damages to her owner as compensation for her unlawful detention. For when a capture is wholly unwarranted by the facts it is the duty of the court to award such compensation to the aggrieved owner or owners.

#### THE PETERHOFF.

(5 Wallace, 28.)

#### CLASSIFICATION OF CONTRABAND AND CONTAMINATION OF OTHER GOODS OF THE OWNER OF CONTRABAND.

And this brings us to the question: Was any portion of the cargo of *The Peterhoff* contraband?

The classification of goods as contraband or not contraband has much perplexed text-writers and jurists. A strictly accurate and satisfactory classification is perhaps impracticable; but that which is best supported by the American and English decisions may be said to divide all merchandise into three classes. Of these classes, the first consists of articles manufactured and primarily and ordinarily used for military purposes in time of war; the second, of articles which may be and are used for purposes of war and peace, according to the circumstances; the third, of articles exclusively used for peaceful purposes. Merchandise of the first class, destined to a belligerent country or places occupied by the army or navy of a belligerent, is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege.

A considerable portion of the cargo of *Peterhoff* was of the third class, and need not be further referred to. A

large portion, was, perhaps, of the second class, but is not proved, as we think, to have been actually destined to belligerent use, and cannot, therefore, be treated as contraband. Another portion was, in our judgment, of the first class, or, if of the second, destined directly to the rebel military service. This portion of the cargo consisted of the cases of artillery harness, and of articles described in the invoices as "men's army bluchers," "artillery boots," and "government regulation gray blankets." These goods come fairly under the description of goods primarily and ordinarily used for military purposes in time of war. They make part of the necessary equipment of an army.

It is true that even these goods, if really intended for sale in the market of Matamoras, would be free of liability; for contraband may be transported by neutrals to a neutral port, if intended to make part of its general stock in trade. But there is nothing in the case which tends to convince us that such was their real destination, while all the circumstances indicate that these articles, at least, were destined for the use of the rebel forces then occupying Brownsville, and other places in the vicinity.

And contraband merchandise is subject to a different rule in respect to ulterior destination than that which applies to merchandise not contraband. The latter is liable to capture only when a violation of blockade is intended; the former when destined to the hostile country, or to the actual military or naval use of the enemy whether blockaded or not. The trade of neutrals with belligerents in articles not contraband is free unless interrupted by blockade; the conveyance by neutrals to belligerents of contraband articles is always unlawful, and such articles may always be seized during transit by sea. Hence, while articles, not contraband, might be sent to Matamoras and beyond to the rebel region, where communications were

not interrupted by blockade, articles of contraband character, destined in fact to a State in rebellion, or for the use of rebel military forces, were liable to capture though primarily destined to Matamoras.

We are obliged to conclude that the portion of the cargo which we have characterized as contraband must be condemned.

And it is an established rule that the part of the cargo belonging to the same owner as the contraband portion must share its fate. This rule is well stated by Chancellor Kent, thus: "Contraband articles are infectious, as it is called, and contaminate the whole cargo belonging to the same owners, and the invoice of any particular article is not usually admitted to exempt it from general confiscation."

So much of the cargo of *The Peterhoff*, therefore, as actually belonged to the owner of the artillery harness, and the other contraband goods, must also be condemned.

The other question relates to costs and expenses.

Formerly conveyance of contraband subjected the ship to forfeiture; but in more modern times, that consequence, in ordinary cases, attached only to the freight of the contraband merchandise. That consequence only attaches in the present case.

But the fact of such conveyance may be properly taken into consideration, with other circumstances, in determining the question of costs and expenses.

It was the duty of the captain of *The Peterhoff*, when brought to by the *Vanderbilt*, to send his papers on board, if required. He refused to do so. The circumstances might well excite suspicion. The captain of a merchant steamer like *The Peterhoff* is not privileged from search by the fact that he has government mail on board; on the contrary he is bound by that circumstance to strict performance of neutral duties and to special respect for belligerent rights.

The search led to the belief on the part of the officers of *The Vanderbilt* that there was contraband on board, destined to the enemy. This belief, it is now apparent, was warranted. It was therefore the duty of the captors to bring *The Peterhoff* in for adjudication, and clearly they are not liable for the costs and expenses of doing so.

On the other hand, not only was the captain in the wrong in the refusal just mentioned, but it appears that the papers were destroyed on board his ship at the time of capture. Some papers were burned by a passenger named Mohl, or by his directions. A package was also thrown overboard by the direction of the captain. This package is variously described by the witnesses as a heavy sealed package wrapped in loose paper; as a box of papers; and as a packet of dispatches sealed up in canvas and weighted with lead. By the captain it is represented as a package belonging to Mohl, and containing a white powder. We are unable to credit this representation. It is highly improbable that, under the circumstances described by the captain, he would have thrown any package overboard at such a time, and with the plain intent of concealing it from his captors, if it contained nothing likely, in his opinion, to prejudice the case of the ship and cargo.

We must say that his conduct was inconsistent with the frankness and good faith to which neutrals, engaged in a commerce open to great suspicion, are most strongly bound. Considering the other facts in the case, however, and the almost certain destination of the ship to a neutral port, with a cargo, for the most part, neutral in character and destination, we shall not extend the effect of this conduct of the captain to condemnation, but we shall decree payment of costs and expenses by the ship as a condition of restitution.

Decree accordingly.

**THE FRANKLIN.**

(3 Robinson's Admiralty Reports, 178.)

**EFFECT OF FRAUDULENT DESTINATION UPON SHIP CARRYING CONTRABAND.****Judgment.**

Sir W. Scott: This is the case of a ship claimed as the property of Prussian subjects, and sufficiently proved to belong to them. The charter-party made with persons at Hamburg, engage her to go from Lubeck to Lisbon. If that was the real destination, there could be no doubt that the owner would be entitled to restitution. But a question has arisen on that fact from the nature of the cargo, and the place in which she was taken. Her cargo consists of several articles directly contraband, if going to the enemy, and not protected by the favorable considerations which are to a certain degree, and in some known instance, applied to the goods of persons exporting the native commodities of their country. The other articles, though not so distinctly contraband, are such as are of great use in naval equipment, and might subject the ship to some penal inconvenience, if going to a hostile port.

The destination, therefore, is the principal fact in this case. The ship was taken out of her proper course, and in a direct course towards one of the Spanish ports in the bay of Biscay, on this side of Cape Finisterre. I have had frequent occasion to observe that it is very difficult to detect a fraud of this species in the particular instances. Pretenses and excuses are always resorted to, the fallacy of which can seldom be completely exposed; and therefore without undertaking the task of exposing them in the particular case, the court has been induced (and I hope not unwarrantably), to hold generally in each case that the certain fact shall prevail over the dubious explanations.

This vessel was going, as it is asserted, to the south of Cape Finisterre, to Lisbon, from the British channel. On



such a voyage, the great object would be, as every person must observe upon looking at the map, without the smallest degree of nautical experience, to keep far enough out to weather Cape Finisterre, and then stand to the east; instead of that, this ship had ingulfed herself deep in the bay of Biscay, and was steering eastward on such a voyage, the ship would have had two or three headlands to weather, and would have been in want of two or three winds for that purpose. It is not immaterial to observe, that this man had navigated in these seas before, and cannot plead inexperience. It is likewise obvious, that on a voyage to Lisbon there would have been particular reason for more than ordinary caution to avoid the coast of Spain; considering the ambiguous state of affairs between Spain and Portugal, we may reasonably suppose such a cargo as this going to Lisbon at this time, would not have been considered as a perfectly innocent cargo by a Spanish cruiser. A case has seldom occurred in which a master, found out of his course, did not attempt to set up some excuse. In the present case no such attempt is made. He admits his sailing towards the Spanish coast; yet he does not resort to the winds or any other cause for an apology. The month of November in the last year was particularly mild; I do not find in the log-book any mention of adverse winds. One witness indeed says that they were steering to the Spanish coast "with very thick weather," but not that they were ignorant of their situation. As the evidence comes from a place where the court has had occasion to remark that the depositions have not always been taken with proper correctness, if the master had offered an affidavit to show that he had tendered any explanation to the commissioners, and that they had omitted to take it down, I would have given him the opportunity of explaining himself here but no explanation of that kind is suggested: I

observe too, that although the master says, "the cargo was to be delivered at Lisbon," he speaks in a very infirm manner to that fact, by a bare reference to his papers. He is the person who made the charter-party, the man making the contract, and directing the actual course of the vessel; from him, therefore, might be expected a positive and distinct testimony, instead of a mere opinion founded only on the contents of his papers, which unless his own knowledge of their truth concurred, are no sufficient foundation for his belief. I am satisfied on the facts of this case, that it was the plan of this voyage to carry the ship fraudulently, under a false destination, into a Spanish port; no explanation having been offered, the present evidence must be taken to be conclusive. The consequence will be, that this fraudulent conduct on the part of those who are concerned in the ship, will justly subject her to confiscation. Anciently, the carrying of contraband, did in ordinary cases affect the ship, and although a relaxation has taken place, it is a relaxation, the benefit of which can only be claimed by fair cases. The aggravation of fraud justifies additional penalties; and the right of pre-emption which would otherwise be defeated, must be secured by them. This is the opinion which on principle I should entertain on this subject but I wish to consider the authority of cases.

10th March. I have deliberated on this case, and desire to be considered as the settled rule of law received by this Court, that the carriage of contraband with a false destination will work a condemnation of the ship as well as the cargo. In the earlier case of the *Sarah Christina*, the court, from a favorable regard to some particular circumstances, practiced an indulgence restoring the ship but without freight and expenses, declaring it at the time to be an indulgence hardly reconcilable to just principle. Having now maturely and upon discussion considered the

general point, I am decidedly of opinion, that confiscation of the vessel is the legal result of the carriage under false destination.

#### THE BERMUDA.

(8 Wallace, 514.)

#### CONVEYANCE OF CONTRABAND BETWEEN NEUTRAL PORTS, BUT WITH APPARENTLY AN ULTERIOR DESTINATION.

Chief Justice Chase delivered the opinion of the court.

[After disposing of the ownership of the vessel, he said]: —

We will next consider the questions relating both to vessel and cargo, which join arising from employment in the trade and under the direction and control shown by the record, assuming for the moment that Haigh was owner.

How, then, was the Bermuda employed? In what trade, and under what control and direction?

The theory of the counsel for Haigh is that she was a neutral ship, carrying a neutral cargo, in good faith, from one neutral port to another neutral port; and they insist that the description of the cargo, if neutral, and in a neutral ship, and on a neutral voyage, cannot be inquired into in the courts of a belligerent.

We agree to this. Neutral trade is entitled to protection in all courts. Neutrals, in their own country, may sell to belligerents whatever belligerents choose to buy. The principal exceptions to this rule are, that neutrals must not sell to one belligerent what they refuse to sell to the other, and must not furnish soldiers or sailors to either; nor prepare, nor suffer to be prepared within their territory, armed ships or military naval expeditions against either. So, too, except goods contraband of war, or conveyed with intent to violate a blockade, neutrals may

transport to belligerents whatever belligerents may agree to take. And so, again, neutrals may convey in neutral ships, from one neutral port to another, any goods, whether contraband of war or not, if intended for actual delivery at the port of destination, and to become part of the common stock of the country or of the port.

It is asserted by counsel that a British merchant, as a neutral, had, during the late civil war, a perfect right to trade, even in military stores, between their own ports, and to sell at one of them goods of all sorts, even to an enemy of the United States, with knowledge of his intent to employ them in rebel war against the American government.

If by trade between neutral ports is meant real trade, in the course of which goods conveyed from one port to another become incorporated into the mass of goods for sale in the port of destination; and if by sale to the enemies of the United States is meant sale to either belligerent, without partiality to either, we accept the proposition of counsel as correct.

But if it is intended to affirm that a neutral ship may take on a contraband cargo ostensibly for a neutral port, either by the same ship or by another, without becoming liable, from the commencement to the end of the voyage, to seizure, in order to the confiscation of the cargo, we do not agree to it.

Very eminent writers on international maritime law have denied the right of neutrals to sell to belligerents, even within neutral territory, articles made for use in war, or to transport such articles to belligerent ports without liability to seizure and confiscation of goods and ship. And this is not an illogical inference from the general maxim that neutrals must not mix in the war. International law, however, in its practical administration, leans to the side of commercial freedom, and allows both free sale and free

conveyance by neutrals to belligerents, if no blockade be violated, of all sorts of goods except contraband; and the conveyance, even of contraband goods, will not, in general, subject the ship, but only the goods, to forfeiture.

We are to inquire, then, whether the Bermuda is entitled to the protection of this rule, or falls within some exception to it.

It is not denied that a large part of her cargo was contraband in the narrowest sense of that word. One portion was made up of Blakely cannon and other guns in cases, of howitzers, of cannon not in cases, of carriages for guns, of shells, fuses and other like articles — near eighty tons in all; and of seven cases of pistols, twenty-one cases of swords, seventy barrels of cartridges, three hundred whole barrels, seventy-eight half-barrels, two hundred and eighty-three quarter barrels of gunpowder. Another portion consisted of printing presses and materials, paper and Confederate States postage stamps, and is described in a letter, found on board, as “presses and paraphernalia complete,” “obtained from Scotland by a commissioner of the Confederate government,” and sent with a “lot of printers and engravers.” The names of these printers and engravers, or at least the names by which they were known on board, are in the crew list; but Westendorff, in a letter already referred to, calls them his “government passengers;” and all the facts connected with this part of the cargo indicate that it actually belonged to the rebel government and was intended for its immediate use. Other very considerable portions of the cargo were also contraband within the received definition of the term.

The character of this cargo makes its ulterior if not direct destination to a rebel port quite certain. And there is other evidence. The letters of Fraser, Trenholm & Company makes distinct references to the contingency of transshipment; and the evidence shows that the

Herald was sent over with a view to this. The consignment of the whole cargo was to order or assigns — that is to say, as we have seen, to the order of John Fraser & Co. or assigns, and is conclusive, in the absence of proof to the contrary, that its destination was the port in which the consignee resided and transacted business. There is much other evidence leading to the same conclusion; but it is needless to go further.

It makes no difference whether the destination to the rebel port was ulterior or direct; nor could the question of destination be affected by transshipment at Nassau, if transshipment was intended, for that could not break the continuity of transportation of the cargo.

The interposition of a neutral port between neutral departure and belligerent destination has always been a favorite resort of contraband carriers and blockade-runners. But it never avails them when the ultimate destination is ascertained. A transportation from one point to another remains continuous, so long as intent remains unchanged, no matter what stoppages or transshipments intervene.

This was distinctly declared by this court in 1855, in reference to American shipments to Mexican ports during the war of this country with Mexico, as follows: “ Attempts have been made to evade the rule of public law by the interposition of a neutral port between the shipment from the belligerent port and the ultimate destination in the enemy’s country; but in all such cases the goods have been condemned as having been taken in a course of commerce rendering them liable to confiscation.”

The same principle is equally applicable to the conveyance of contraband to belligerents; and the vessel which, with the consent of the owner, is employed in the first stage of a continuous transportation, is equally liable to capture and confiscation with the vessel which is employed

in the last, if the employment is such as to make either so liable.

This rule of continuity is well established in respect to cargo.

At first, Sir William Scott held that the landing and warehousing of the goods and the payment of the duties on importation was a sufficient test of the termination of the original voyage; and that a subsequent exportation of them to a belligerent port was lawful. But in a later case, in an elaborate judgment, Sir William Grant reviewed all the cases, and established the rule, which has never been shaken, that even the landing of goods and payment of duties does not interrupt the continuity of the voyage of the cargo, unless there be an honest intention to bring them into the common stock of the country. If there be an intention, either formed at the time of original shipment, or afterwards, to send the goods forward to an unlawful destination, the continuity of the voyage will not be broken, as to the cargo, by any transaction at the intermediate port.

There seems to be no reason why this reasonable and settled doctrine should not be applied to each ship, where several are engaged successfully in one transaction, namely, the conveyance of a contraband cargo to a belligerent. The question of liability must depend on the good or bad faith of the owners of the ships. If a part of the voyage is lawful, and the owners of the ship conveying the cargo in that part are ignorant of the ulterior destination, and do not hire their ship with a view to it, the ship can not be liable; but if the ulterior destination is the known inducement to the partial voyage, and the ship is engaged in the latter with a view to the former, then whatever liability may attach to the final voyage, must attach to the earlier, undertaken with the same cargo and in continuity of its conveyance. Successive voyages, connected by a common

plan and a common object form a plural unit. They are links of the same chain, each identical in description with every other, and each essential to the continuous whole. The ships are planks of the same brigade, all of the same kind, and all necessary to the convenient passage of persons and property from one end to the other.

There remains the question whether *The Bermuda*, on the supposition that she was really a neutral ship should be condemned for carrying contraband. For, in general, as we have seen, a neutral may carry contraband to a belligerent, subject to no liability except seizure in order to confiscation of the offending goods. The ship is not forfeited, neither are non-offending parts of the cargo.

This has been called an indulgent rule, and so it is. It is a great, but very proper relaxation of the ancient rule, which condemned the vessel carrying the contraband as well as the cargo. But it is founded on the presumption that the contraband shipment was made without the consent of the owner given in fraud of belligerent rights, or, at least, without intent on his part to take hostile part against the country of his captors; and it must be recognized and enforced in all cases where the presumption is not repelled by proof. The rule, however, requires good faith on the part of the neutral, and does not protect the ship where good faith is wanting.

*The Franklin*, therefore, carrying contraband with a false destination, was condemned after mature consideration, by Sir William Scott in 1801. He said that, "the benefit of the relaxation could only be claimed by fair cases." This doctrine was shortly after applied to *The Neutralitet* by the same great judge, and it received the sanction of this court in an opinion delivered by an equal judge, in 1834. The leading principle governing this class of cases was stated very clearly by Mr. Justice Story in that opinion, thus: "The belligerent has a right to require a frank and



bona fide conduct on the part of neutrals in the course of their commerce in times of war, and if the latter will make use of fraud and false papers to elude the just rights of belligerents and cloak their own illegal purposes, there is not injustice in applying to them the penalty of confiscation."

Mere consent to transportation of contraband will not always or usually be taken to be a violation of good faith. There must be circumstances of aggravation. The nature of the contraband articles and their importance to the belligerent, and the general features of the transaction, must be taken into consideration in determining whether the neutral owner intended or did not intend, by consenting to the transportation, to mix in the war.

The *Ranger*, though a neutral vessel, was condemned for being employed in carrying a cargo of sea stores to a place of naval equipment under false papers. The owner had not consented, but the master had, and Sir William Scott said, "If the owner will place his property under the absolute management and control of persons who are capable of lending it in this manner to be made an instrument of fraud in the hands of the enemy, he must sustain the consequences of such misconduct on the part of his agent."

So, too, The *Jonge Emilia*, a neutral vessel, was condemned on the ground that she appeared to have been altogether in the hands of enemy merchants and employed for seven voyages successively in enemy trade; and The *Carolina* was condemned for employment in the transportation of troops, though the master alleged that it was under duress, and the actual service was at an end.

Now, what were the marks by which the conveyance of contraband on The *Bermuda* was accompanied? First, we have the character of the contraband articles, fitted for immediate military use in battle, or for the immediate

civil service of the rebel government; then the deceptive bills of lading requiring delivery at Bermuda, when there was either no intention to deliver at Bermuda at all, or none not subject to be changed by enemies of the United States; then the appointment of one of these enemies as master, necessarily made with the knowledge and consent of Haigh, if he was owner; then the complete surrender of the vessel to the use and control of such enemies, without even the pretense of want of knowledge, by the alleged owner, of her destined and actual employment.

We need not go further. We are bound to say, considering the known relations of Fraser, Trenholm & Co. with the rebel leaders; and the relations of John Fraser & Co. to the same combination, justly inferable from the fact that they were the consignees of the whole cargo; and considering, also, the ascertained character of most of it, that it seems to us highly probable that the ship, at the time of the capture, was actually in service of the so-called Confederate government, and known to be so by all parties interested in her ownership.

However this may be, we cannot doubt that The Bermuda was justly liable to condemnation for the conveyance of contraband goods destined to be a belligerent port, under circumstances of fraud and bad faith, which make the owner, if Haigh was owner, responsible for unneutral participation in the war.

The cargo, having all been assigned to enemies, and most of it contraband, must share the fate of the ship.

Having thus disposed of the questions connected with the ownership, control, and employment of The Bermuda, and the character of her cargo, we need say little on the subject of liability for violation of the blockade. What has been already adduced of the evidence, satisfies us completely that the original destination of The Bermuda was to a blockaded port; or, if otherwise, to an intermediate

port, with intent to send forward the cargo by transshipment into a vessel provided for the completion of the voyage. It may be that the instructions to Westendorff were not settled when the ship left St. George's for Nassau; but it is quite clear to us that the ship was then at the disposition of John Fraser & Co., and that the voyage, begun at Liverpool with the intent to violate the blockade, delayed at St. George's for instructions from that firm, continued toward Nassau with the purpose of completion from that port to a rebel port, either by The Bermuda herself or by transshipment, was one voyage from Liverpool to a blockaded port; and that the liability to condemnation for attempted breach of blockade was, by sailing with such purpose, fastened on the ship as firmly as it would have been by proof of intent that the cargo should be transported by The Bermuda herself to a blockaded port, or as near as possible, without encountering the blockading squadron, and then sent in by a steamer, like the Herald, of lighter draft or greater speed.

We have not thought it necessary to examine the questions made by counsel touching the right of belligerents to make captures within cannon-shot range of neutral territory, for there is nothing in the evidence which proves to our satisfaction that The Bermuda was within such range.

Our conclusion is, that both vessel and cargo, even if both were neutral, were rightly condemned; and, on every ground, the decree below must be affirmed.

#### THE JONGE MARGARETHA.

(1 Robinson's Admiralty Reports, 159.)

#### CIRCUMSTANCES UNDER WHICH PROVISIONS ARE CONTRABAND.

This was a case of a Papenburg ship, taken on a voyage from Amsterdam to Brest with a cargo of cheese.

Sir W. Scott: There is little reason to doubt the property in this case, and therefore passing over the observations which have been made on that part of the subject, I shall confine myself to the single question: Is this a legal transaction in a neutral, being the transaction of a Papenburg ship carrying Dutch cheese from Amsterdam to Brest or Morlaix (it is said) but certainly to Brest? or as it may be otherwise described, the transactions of a neutral carrying a cargo of provisions, not the product and manufacture of his own country, but of the enemy's ally in the war — of provisions which are a capital ship's store — and to the great port of the naval equipment of the enemy.

If I adverted to the state of Brest at this time, it might be no unfair addition to the terms of the description, if I noticed what was notorious to all Europe at this time, that there was in that port a considerable French fleet in a state of preparation for sallying forth on a hostile expedition; its motions at that time watched with great anxiety by a British fleet which lay off the harbor for the purpose of defeating its designs. Is the carriage of such a supply to such a place, and on such an occasion, a traffic so purely neutral, as to subject the neutral trader to no inconvenience?

If it could be laid down as a general position, in the manner in which it has been argued, that cheese being a provision is universally contraband, the question would be readily answered; but the court lays down no such position. The catalogue of contraband has varied much, and sometimes in such a manner as to make it very difficult to assign the reasons of the variations; owing to particular circumstances, the history of which has not accompanied the history of the decisions. In 1673, when many unwarrantable rules were laid down by public authority respecting contraband, it was expressly asserted by Sir R. Wiseman, the then King's Advocate, upon a formal ref-

erence made to him, that by the practice of the English Admiralty, corn, wine, and oil, were liable to be deemed contraband. "I do agree," says he, reprobating the regulations that had been published, and observing that rules are not to be so hardly laid down as to press upon neutrals, "that corn, wine, and oil, will be deemed contraband."

These articles of provisions then were at that time confiscable, according to the judgment of a person of great knowledge and experience in the practice of his Court. In much later times many other sorts of provisions have been condemned as contraband. In 1747, in the *Jonge Andreas*, butter, going to Rochelle, was condemned; how it happened that cheese at the same time was more favorably considered, according to the case cited by Dr. Swabey, I don't exactly know; the distinction appears nice; in all probability the cheeses were not of the species which is intended for ship's use. Salted cod and salmon were condemned in the *Jonge Frederick*, going to Rochelle, in the same year; in 1748, in the *Joannes*, rice and salted herrings were condemned as contraband. These instances show that articles of human food have been so considered, at least where it was probable that they were intended for naval or military use.

I am aware of the favorable positions laid down upon this matter by Wolfius and Vattel, and other writers of the continent, although Vattel expressly admits that provisions may, under circumstances, be treated as contraband. And I take the modern established rule to be this, that generally they are not contraband, but may become so under circumstances arising out of the particular situation of the war, or the condition of the parties engaged in it. The court must therefore look to the circumstances under which this supply was sent.

Among the circumstances which tend to preserve provi-

sions from being liable to be treated as contraband, one is, that they are of the growth of the country which exports them. In the present case, they are the product of another country, and that a hostile country, and the claimant has not only gone out of his way for the supply of the enemy, but he has assisted the enemy's ally in the war by taking off his surplus commodities.

Another circumstance to which some indulgence by the practice of nations, is shown, is, when the articles are in their native and unmanufactured state. Thus iron is treated with indulgence, though anchors and other instruments fabricated out of it are directly contraband. Hemp is more favourably considered than cordage; and wheat is not considered so noxious a commodity as any of the final preparations of it for human use. In the present case, the article falls under this unfavorable condition, being a manufacture prepared for immediate use.

But the most important distinction is, whether the articles were intended for the ordinary use of life, or even for mercantile ship's use; or whether they were going with a highly probable destination to military use? Of the matter of fact on which the distinction is to be applied, the nature and quality of the port to which the articles were going, is not an irrational test; if the port is a general commercial port, it shall be understood that the articles were going for civil use, although occasionally a frigate or other ships of war, may be constructed in that port. *Contra*, if the great predominant character of the port be that of a port of naval military equipment, it shall be intended that the articles were going for military use, although merchant ships resort to the same place, and although it is possible that the articles might have been applied to civil consumption; for it being impossible to ascertain the final use of an article *ancipitis usus*, it is not an injurious rule which deduces both ways the final use from

the immediate destination; and the presumption of hostile use, found on its destination to a military port, is much inflamed, if at the time when the articles were going a considerable armament was notoriously preparing, to which a supply of those articles would be eminently useful.

In the case of the *Endraght* cited for the claimant, the destination was to Bourdeaux; and though smaller vessels of war may be occasionally built and fitted out there, it is by no means a port of naval military equipment in its principal occupation, in the same manner as Brest is universally known to be.

The court, however, was unwilling, in the present case, to conclude the claimant on the mere point of destination, it being alleged that the cheeses were not fit for naval use, but were merely luxuries for the use of domestic tables. It therefore permitted both parties to exhibit affidavits as to their nature and quality. The claimant has exhibited none; but here are authentic certificates from persons of integrity and knowledge, that they are exactly such cheeses as are used in British ships, when foreign cheeses are used at all; and that they are exclusively used in French ships of war.

Attending to all these circumstances, I think myself warranted to pronounce these cheeses to be contraband, and condemn them as such. As, however, the party has acted without dissimulation in the case, and may have been misled by an inattention to circumstances, to which in strictness he ought to have adverted, as well as by something like an irregular indulgence on which he had relied; I shall content myself with pronouncing the cargo to be contraband, without enforcing the usual penalty of the confiscation of the ship belonging to the same proprietor.

## THE COMMERCE.

(1 Wheaton, 382.)

## IS NEUTRAL VESSEL ENTITLED TO FREIGHT ON ENEMY GOODS CAPTURED, WHEN SUCH GOODS ARE CONTRABAND?

Appeal from the circuit court for the district of Massachusetts. This was the case of a Swedish vessel captured on the 16th of April, 1814, by the private armed schooner Lawrence, on a voyage from Limerick, in Ireland, to Bilboa, in Spain. The cargo consisted of barley and oats, the property of British subjects, the exportation of which is generally prohibited by the British government; and, as well by the official papers of the custom-house, as by the private letters of the shippers, it appears to have been shipped under the special permission of the government, for the sole use of his Britannic majesty's forces then in Spain. Bonds were accordingly given for the fulfillment of this object. At the hearing in the district of Maine, the cargo was condemned as enemy's property, and the vessel restored, with an allowance, among other things, of the freight for the voyage, according to the stipulation of the charter-party. The captors appealed from so much of the sentence as decreed freight to the neutral ship, and, upon the appeal of the circuit court of Massachusetts, the decree, as to freight, was reversed, and from this last sentence an appeal was prosecuted to this court.

Story, J., delivered the opinion of the court.

The single point now in controversy in this cause is, whether the ship is entitled to the freight for the voyage. The general rule that the neutral carrier of enemy's property is entitled to his freight is now too firmly established to admit of discussion. But to this rule there are many exceptions. If the neutral be guilty of fraudu-



lent or unneutral conduct, or has interposed himself to assist the enemy in carrying on the war, he is justly deemed to have forfeited his title to freight. Hence, the carrying of contraband goods to the enemy; the engaging in the coasting or colonial trade of the enemy; the spoliation of papers, and the fraudulent suppression of enemy interests, have been held to affect the neutral with the forfeiture of freight; and in cases of a more flagrant character, such as carrying dispatches or hostile military passengers, an engagement in the transport service of the enemy, and a breach of blockade, the penalty of confiscation of the vessel has also been inflicted. Bynk. Quaest. J. Pub. c. 14; *The Sarah Christina*, 1 Rob. 237; *The Haase*, 1 Rob. 286; *The Emanuel*, 1 Rob. 296; *The Immanuel*, 2 Rob. 186; *The Atlas*, 3 Rob. 299; *The Rising Sun*, 3 Rob. 104; *The Maddona del Burso*, 4 Rob. 169; *The Neutralitat*, 3 Rob. 295; *The Welvart*, 3 Rob. 128; *The Friendship*, 6 Rob. 420. By the modern law of nations, provisions are not, in general, deemed contraband; but they may become so, although the property of a neutral, on account of the particular situation of the war, or on account of their destination, *The Jonge Margaretha*, 1 Rob. 189. If destined for the ordinary use of life in the enemy's country they are not, in general, contraband. *The Jonge Margaretha*, 1 Rob. 189. Another exception from being treated as contraband is, where the provisions are the growth of the neutral exporting country. But if they be the growth of the enemy's country, and more especially if the property of his subjects, and destined for enemy's use, there does not seem any good reason for the exemption; for, as Sir William Scott has observed, in such case the party has not only gone out of his way for the supply of the enemy, but he has assisted him by taking off his surplus commodities. *The Jonge Margaretha*, 1 Rob. 189. But it is argued that the doctrine of

contraband cannot apply to the present case, because the destination was to a neutral country; and it is certainly true that goods destined for the use of a neutral country can never be deemed contraband whatever may be their character, or however well adapted to warlike purposes. But if such goods are destined for the direct and avowed use of the enemy's army or navy, we should be glad to see an authority which countenances this exception from forfeiture, even though the property of a neutral. Suppose, in time of war, a British fleet were lying in a neutral port, would it be lawful for a neutral to carry provisions or munitions of war thither, avowedly for the exclusive supply of such fleet? Would it not be a direct interposition in the war, and an essential aid to the enemy in his preparations? In such a case the goods, even if belonging to a neutral, would have had the taint of contraband in its most offensive character, on account of their destination; and the mere interposition of a neutral port would not protect them from forfeiture. Strictly speaking, however, this is not a question of contraband; for that can arise only when the property belongs to a neutral, and here the property belonged to an enemy, and, therefore, was liable, at all events, to condemnation. But was the voyage lawful, and such as a neutral could, with good faith, and without a forfeiture, engage in? It has been solemnly adjudged that being engaged in the transport service, or in the conveyance of military persons in his employ, are acts of hostility which subject the property to confiscation. *The Carolina*, 4 Rob. 256; *The Friendship*, 6 Rob. 420; *The Orozembo*, 6 Rob. 430. And the carrying of dispatches from the colony to the mother country of the enemy has subjected the party to the like penalty. *The Atalanta*, 6 Rob. 440; *The Constantia*, 6 Rob. 461, note. And in these cases, the fact that the voyage was to a neutral port was not thought to change the character of

the transaction. The principle of these determinations was asserted to be that the party must be deemed to place himself in the service of the hostile state, and assist in warding off the pressure of the war, or in favoring its offensive projects. Now we cannot distinguish these cases, in principle, from that before the court. Here is a cargo of provisions exported from the enemy's country, with the avowed purpose of supplying arms to the enemy. Without this destination, they would not have been permitted to be exported at all. Can a more important or essential service be performed in favor of the enemy? In what does it differ from the case of a transport in his service? The property, nominally, belongs to individuals, and is freighted, apparently, on private account, but, in reality, for public use, and under a public contract, implied from the very permission of exportation. It is vain to contend that the direct effect of the voyage was not to aid the British hostilities against the United States. It might enable the enemy, indirectly, to operate with more vigor and promptitude against us, and increase his disposable force. But it is not the effect of the particular transaction that the law regards; it is the general tendency of such transactions to assist the military operations of the enemy, and the temptations which it presents to deviate from a strict neutrality. Nor do we perceive how the destination, to a neutral port, can vary the application of this rule; it is only doing that indirectly which is prohibited in direct courses. Would it be contended that a neutral might lawfully transport provisions for the British fleet and army, while it lay at Bordeaux, preparing for an expedition against the United States? Would it be contended that he might lawfully supply a British fleet stationed on our coast? We presume that two opinions could not be entertained on such questions; and yet, though the cases put are strong, we do not know that the assistance is more material than

might be supplied under cover of a neutral destination like the present.

An attempt has been made to distinguish this case from the ordinary cases of employment in the transport service of the enemy, upon the ground that the war of Great Britain against France, was a war distinct from that against the United States; and that Swedish subjects had a perfect right to assist the British arms in respect to the former, though not to the latter. Whatever might be the right of the Swedish sovereign, acting under his own authority, we are of opinion that if a Swedish vessel be engaged in the actual service of Great Britain, or in carrying stores for the exclusive use of the British armies, she must, to all intents and purposes, be deemed a British transport. It is perfectly immaterial in what particular enterprise those armies might, at the time, be engaged; for the same important benefits are conferred upon an enemy, who thereby acquires a greater disposable force to bring into action against us. In the *Friendship*, 6 Rob. 420, 426, Sir W. Scott, speaking on this subject, declares "It signifies nothing whether the men so conveyed are to be put into action, on an immediate expedition, or not. The mere shifting of drafts in detachments, and conveyance of stores from one place to another, is an ordinary employment of a transport vessel, and it is a distinction totally unimportant, whether this or that case may be connected with the immediate active service of the enemy. In removing forces from distant settlements, there may be no intention of immediate action, but still, the general importance of having troops conveyed to places where it is convenient that they should be collected, either for present or future use, is what constitutes the object and employment of transport vessels." It is obvious that the learned judge did not deem it material to what places the stores might be

destined; and it must be equally immaterial what is the immediate occupation of the enemy's military force. That force is always hostile to us, be it where it may be. To-day it may act against France, to-morrow against us; and the better its commissary department is supplied, the more life and activity is communicated to all its motions. It is not, therefore, in our view, material whether there be another distinct war in which our enemy is engaged or not; it is sufficient that his armies are everywhere our enemies, and every assistance offered to them must, directly or indirectly, operate to our injury.

On the whole, the court are of opinion that the voyage in which this vessel was engaged, was illicit, and inconsistent with the duties of neutrality, and that it is a very lenient administration of justice to confine the penalty to a mere denial of freight.

#### THE HAABET.

(2 Robinson's Admiralty Reports, 146.)

INSURANCE ON CARGO OF NEUTRAL CAPTURED BY BELLIGERENT AS CONTRABAND BUT RESTORED TO OWNER.

Judgment. Sir William Scott: This is a question on a report of the registrar and merchants respecting an allowance of insurance on a cargo of corn, seized and brought into this country. The cargo was ordered to be restored, and the registrar and merchants were directed to make a report on the value due to the claimant; such reports are in their nature partly legal and partly mercantile; it is a report proceeding from persons qualified in both these respects, to form a sound judgment on the subject before them; one of them being, from his connection with courts of justice, supposed capable of forming an opinion, and of assisting his associates on all questions of law, in the first instance, subject to the inspection and correction of

the court, whilst the other part of this domestic forum, as I may call it, consists of persons acquainted with trade, and exercising their judgment on matters relative to commerce. It is from the report of a commission so constituted, that the question is now brought before the court on a subject partly legal and partly mercantile. Another report has been brought before us to-day from other persons, private merchants, of whom it is impossible for me to speak with too much respect, attending either to the extent of their information, or to their known probity and honor; but they have, I think, a little mistaken their function in delivering their judgment upon the question proposed to them; they are persons of great experience in mercantile affairs, and from whom the court, upon subjects purely of that kind, would gladly receive any information which they could conveniently impart. If the court had desired to know, whether it was the practice of merchants, in the ordinary courts of commerce, usually to charge and allow insurance, though the insurance has never actually been made, their answer to such a question would have satisfied its conscience upon a matter of usage best known to themselves, and requiring nothing on their part but a fair communication of their own experience and practice. But the question on which an opinion has here been obtained from them is this: "Whether if a neutral cargo is seized by a belligerent during war, the belligerent is in all cases bound in compensation for this cargo (supposing it is not liable to confiscation) to pay such an insurance, no insurance having been paid by the shipper?" That is not a question merely of the law merchant, it is a question which may embrace other considerations, and those belonging to the general law of nations; in truth, it is the very question in the cause now submitted to my decision, and if I regard this opinion so given as an authority, there is an end of any duty which

I have to perform, for here is an actual decision upon the whole law and fact of the present case. They will acquit me, I am sure, of any incivility, when I venture to say, that the labor of giving such a decision is not legally imposed upon them, and therefore that this private report so introduced, does not come with any just credentials of authority.

The question is, Whether there is any reasonable ground for me to pronounce that the registrar and merchants have disallowed a just demand, in disallowing a charge of insurance which had not been made. It has been argued that this charge ought to have been allowed, because it is usually so allowed in the dealings of merchants with each other; I am not clear that this is a necessary consequence, for it is surely no certain rule that in all cases where a cargo is taken *jure belli* but for the mere purpose of preëmption, that it is to receive a price calculated exactly in the same manner, and amounting precisely to the same value, as it would have done, if it had arrived at its port of destination in the ordinary course of trade.

The right of taking possession of cargoes of this description, Commeatus or Provisions, going to the enemy's ports, is no peculiar claim of this country; it belongs generally to belligerent nations; the ancient practice of Europe, or at least of several maritime states of Europe, was to confiscate them entirely; a century has not elapsed since this claim has been asserted by some of them. A more mitigated practice has prevailed in later times of holding such cargoes subject to purchase upon a reasonable compensation, to the individual whose property is thus diverted. I have never understood that, on the side of the belligerent, this claim goes beyond the case of cargoes avowedly bound to the enemy's ports, or suspected, on just grounds, to have a concealed destination of that kind, or that on the side of the neutral, the same exact compensation is to be expected,

which he might have demanded from the enemy in his own port; the enemy may be distressed by famine, and may be driven by necessities to pay a famine price for the commodity if it gets there; it does not follow that acting upon my rights of war in intercepting such supplies, I am under the obligation of paying that price of distress. It is a mitigated exercise of war on which my purchase is made, and no rule has established that such a purchase shall be regulated exactly upon the same terms of profit, which would have followed the adventure, if no such exercise of war had intervened; it is a reasonable indemnification and a fair profit on the commodity that is due, reference being had to the original price actually paid by the exporter, and the expenses which he has incurred. As to what is to be deemed a reasonable indemnification and profit, I hope and trust that this country will never be found backward in giving a liberal interpretation to these terms; but certainly the capturing nation does not always take these cargoes on the same terms, on which an enemy would be content to purchase them; much less are cases of this kind to be considered as cases of costs and damages, in which all loss of possible profit is to be laid upon unjust captors; for these are not unjust captures, but authorized exercises of the rights of war.

Two or three considerations have been urged, which may, with all propriety, be dismissed; one is, that it was understood between the King's government and the parties that this change should be allowed: Certainly if it were made out by any credible proof, that the faith of government had been in the slightest manner pledged to such an understanding, there is no principle which this court would hold more sacred, than that the faith of government should be held inviolate in transactions of this kind; but no sort of proof is offered of this, and the fact has in no way come to my knowledge. It is said likewise, that



in the cases of this kind which occurred last war, and which were then settled by the Navy Board, the charge of insurance was allowed, but the policy of insurance was never called for. How this practice came to prevail there, whether under a notion that the insurance had been really made whenever they were charged, whether under any order of government, or how otherwise, I am not informed; the persons who had to settle those accounts were not mercantile men, and might be led by the charge to suppose, that it had actually been incurred: Under whatever circumstances such a practice grew up, if it did obtain, it is no binding rule upon the registrar and merchants here, it might be simple mistake, and at best it is no deciding authority.

I have already said, that the expected payments at the port of delivery, is not the necessary measure of compensation at the port of the belligerent. It is not so with reference to any constituent of price; with respect to insurance, considered as such, it would be peculiarly improper; it is reasonably to be charged at the port of delivery, although it has never been paid, because the merchant has stood his own risk, and has purchased the insurance at the expense of his own danger. But is that the case where the voyage has been interrupted almost in its commencement, where the cargo has been carried into a neighboring port? In the present case the voyage was from Altona to Cadiz, from the north to the south of Europe, and the cargo is seized upon its entrance to the British Channel, very soon after quitting its port. Most of the cargoes taken have a similar destination, and are taken under similar circumstances: What pretense is there to say that all risks of the voyage have been incurred? The utmost that could be claimed is an insurance *pro rata itineris peracti*, amounting to a very small proportion of the whole, hardly deserving a particular consideration. As

to what is said, that in the case of capture of ships, you allow the full freight of the whole voyage; that allowance is made on another account; you take the ship in that case on account, not of itself, but of its cargo; you interrupt its occupation which was legal and innocent, and it is therefore not unjust to allow it the benefit of its original contract, which you alone have prevented from being carried into execution. Very different is the consideration of risk, respecting a cargo, which has never been incurred, and of a payment which is due only, on the event of that risk having been actually incurred — no contract subsisting, and the cargo being, in its own nature, liable to this species of interception.

Upon the whole, I see no sufficient reason to pronounce that the Registrar and merchants have adopted a wrong measure of value in disallowing the charge of insurance; they have allowed what, upon their own experience, they pronounce to be a reasonable indemnification and profit, and I do not understand that the sufficiency of this indemnification and profit is impeached, on any other ground, than that an insurance would have been added in the ordinary course of a mercantile account, if the cargo had reached its intended destination. Being of opinion that the ordinary terms of a mercantile account, to be settled on the completion of the voyage, do not furnish (all circumstances being duly weighed) the necessary or just measure of value, to be applied in transactions of this kind, I do not find myself enabled to sustain the objection. If, as it has been repeatedly urged, an understanding to a different effect has subsisted between the King's government and the parties, there can be no doubt that on their resort to a superior tribunal, better acquainted with any communications that may have passed upon the subject, they will have the full benefit of any such engagement.

Report confirmed.

**CARRINGTON v. MERCHANTS' INSURANCE COMPANY.**

(8 Peters, 495.)

**INTERPRETATION OF CLAUSES IN INSURANCE POLICIES EXCEPTING LOSSES INCURRED IN ILLICIT OR CONTRABAND TRADE.**

Story, J., delivered the opinion of the court.

On the 1st of October, 1824, the defendants, the Merchants' Insurance Company, underwrote a policy of insurance for the plaintiffs, Carrington and others, for \$10,000, on property on board the ship General Carrington, at and from the port of Coquimbo, in Chili, to any port or ports, place or places, one or more times, for and during the term of twelve calendar months, commencing on the 5th day of June, 1824, at noon, and ending on the 5th day of June, 1825, at noon. The policy is against the usual perils, and contains the following clause: "It is also agreed that the assurers shall not be answerable for any charge, damage or loss which may arise in consequence of seizure or detention, for or on account of illicit or prohibited trade, or trade in articles contraband of war. But the judgment of a foreign consular or colonial court shall not be conclusive upon the parties as to the fact of there having been articles contraband of war on board; or as to the fact of an attempt to trade in violation of the law of nations."

The ship sailed from Providence, Rhode Island, on the 21st of December, 1823, cleared for the Sandwich Islands and Canton, but was immediately bound to Valparaiso, in Chili, with such ulterior destination as was stated in her orders; the clearance being a usual and customary mode of clearance at that time for vessels bound to Chili and Peru. A part of the cargo consisted

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of 18 cases of muskets and bayonets, each case containing 20; and 300 kegs or quarter kegs of cannon-powder, containing about 25 pounds each; and these, together with the residue of the cargo, belonged to the owners of the ship. At the commencement of the voyage and until the final loss of the ship, open hostilities existed between Spain and the new government or states of Chili and Peru. From the orders it was apparent that the object of the voyage was to sell the cargo in Chili and Peru. The ship was to proceed direct for Valparaiso and was to enter that port under the plea of a want of water. Some part of the cargo was expected to be sold at that port; and thence the ship was to proceed along the coast of Chili and Peru for the purposes of trade. There is no allegation that the underwriters were not well acquainted with the nature and objects of the voyage.

The ship arrived at Valparaiso on the 17th of April, 1824. At the time of her arrival, and until the loss, as hereinafter stated, the Spanish royal authorities were in possession of a portion of upper Peru, including Quilca and Moliendo, and of the port of Callao, in lower Peru. The rest of Peru, and the whole of Chili, were in possession of the Peruvian and Chilian new governments. In the harbor of Valparaiso, 16 casks of the powder were, with the knowledge of the government, sent on board of an English brig, then in the harbor; and as the plaintiffs allege, sold to the master of the brig; and all the muskets except 10 alleged to be kept for the ship's use, were landed in Valparaiso, with the knowledge of the government.

The ship, with the remainder of her cargo on board, sailed from Valparaiso, early in May following; arrived

at Coquimbo, in Chili, on the 13th day of the same month. There, the remainder of the powder, except 9 casks, more or less damaged, alleged to be retained for the ship's use, was landed in the course of the same month, with the knowledge of the government. The ship sailed from Coquimbo for Huasco, in Chili, on or about the 5th day of June following, and arrived at Huasco in the same month; having sold, at the previous port, a part of her outward cargo, by permission of the government, as the plaintiffs allege, and taken in merchandise belonging to the plaintiffs, and other citizens of the United States, to be delivered at some ports on the coast. The ship arrived at Quilca, with the greater part of her outward cargo still on board, on the 20th of June, and there sold, with the knowledge of the government, as the plaintiffs allege, a considerable portion of her outward cargo; and delivered some of the articles taken in at the previous ports. While lying at anchor in the roadstead of Quilca, and before she had completed the discharge of her outward cargo, she was seized by an armed vessel, called *The Constante*, commanded by one Jose Martinez, sailing under the royal flag, and acting, as the defendants allege, by the royal authority of Spain; but alleged by the plaintiffs to be fitted out and commissioned at Callao, by Jose Ramon Rodil, the highest military commander of the castle of Callao, holding his commission subordinate to La Serna, the viceroy of Peru, under the king of Spain; there being, as the defendants allege, no regular civil government in the place; the castle of Callao being then, and until the final loss of the ship, besieged by sea and land. The ship was carried from Quilca to Callao, where certain proceedings were had against her and her cargo on

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board, by the orders of General Rodil; and they were never restored, but were totally lost to the plaintiffs. The alleged cause of the seizure and detention was the trade in articles contraband of war, by the landing of the powder and muskets in Chili, as aforesaid.

Upon the trial of the cause upon the evidence, the following question occurred upon which the opinions of the judges were opposed; and thereupon it was ordered by the court, on motion of the counsel for the plaintiffs, that the points on which the disagreement happened, should be certified to the supreme court of the United States, for their decision, namely:

1. Whether a seizure and detention, to come within the exception of the policy relating to contraband and illicit trade, must be for a legal and justifiable cause.

2. Whether assuming the other facts to be as stated and alleged, and taking the authority of the seizing vessel to be such as the plaintiffs allege, there was a legal and justifiable cause for the seizure and detention of The General Carrington and her cargo.

3. Whether, assuming the other facts to be as stated and alleged and taking the authority of the seizing vessel to be such as the defendants allege, there was a legal and justifiable cause for the seizure and detention of The General Carrington and her cargo.

4. Whether a general in the military service of Spain, subordinate to La Serna, viceroy of Peru, under the king of Spain, but having the actual and exclusive command of Callao, and no civil authority existing therein, and cut off, by the forces of the enemy by sea and land, from all communication with any superior civil or military officer, could lawfully seize and detain neutral property for contraband trade, if just cause existed for a condemnation thereof.

5. Whether such officer, so situated, has a right to appoint and constitute a court, of which he himself is one, for the trial and condemnation of such property.

6. Whether, supposing the ship to have traded in articles contraband of war in the ports of Chili, and to have been seized afterwards in a port of Peru, then under the royal authority, before she had discharged her outward cargo, for and on account of such contraband trade, the underwriters be not discharged, whether the subsequent proceedings for her adjudication were regular or irregular.

This cause comes before the court upon a certificate of a division of opinion of the judges of the circuit court for the district of Massachusetts.

Upon the trial of the cause upon the evidence, the parties propounded certain questions, upon which the circuit court (with the assent of the parties) certified a division of opinion, for the purpose of obtaining the final decision of this court in regard to them.

The first is, whether a seizure and detention, to come within the exception of the policy relating to contraband and illicit trade, must be for a legal and justifiable cause. The question here propounded is not, whether there must be a legal or justifiable cause for condemnation; but simply, whether there must not be such cause for the seizure and detention. And we are of opinion that the question ought to be answered in the affirmative. The language of the exception, when properly construed, leads to this conclusion; and it is confirmed by authorities standing upon analogous clauses. The language is: "The assurers shall not be liable for any charge, damage, or loss which may arise in consequence of seizure or detention for or on account of illicit trade,

or trade in articles contraband of war." It is not, then, every seizure or detention which is excepted; but such only as is made for and on account of a particular trade. A seizure or detention, which is a mere act of lawless violence, wholly unconnected with any supposed illicit or contraband trade, is not within the terms or spirit of the exception. And as little is a seizure or detention not bona fide made upon a just suspicion of illicit or contraband trade, but the latter used as a mere pretext or color for an act of lawless violence; for under such circumstances, it can in no just sense be said to be made for or on account of such trade. It is a mere fraud to cover a wanton trespass; a pretense, and not a cause for the tort. To bring a case, then, within the exception, the seizure or detention must be bona fide, and upon a reasonable ground. If there has not been an actual illicit or contraband trade, there must at least be a well-founded suspicion of it, a probable cause to impute guilt, and justify further proceedings and inquiries; and this is what the law deems a legal and justifiable cause for the seizure or detention. The general words of the policy cover the risks of restraints and detentions of all kings, princes and peoples. The exception withdraws from it such as are bona fide made for, and on account of illicit or contraband trade. So that, upon the mere terms of the exception, there would not seem any real ground for doubt. But if there were, the next succeeding clause associated with it, demonstrates that such must have been the understanding of the parties. It is there said that the judgment of a foreign consular or colonial court shall not be conclusive upon the parties as to the fact of an attempt to trade in violation of the laws of nations. Now, if a mere lawless seizure or detention, under the pretext of illicit

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and contraband trade, were within the exception; the inquiry, whether there had been contraband articles on board, or an attempt of illicit trade, would be in most, if not in all, cases wholly unimportant and nugatory to the assured, for whose benefit the clause is introduced; since the sentence would always establish a pretense for the seizure and detention, although not justifiable cause for it. The reasonable interpretation of the clause must be, that it was introduced to enable the assured to disprove the existence of justifiable cause for the seizure or detention by showing that the fact did not warrant it.

We think that the authorities cited at the bar lead to the same conclusion. In *Church v. Hubbard*, 2 Cranch, 187, 2 Cond. Rep. 385, where the exception was, "that the insurers do not take the risk of illicit trade with the Portuguese, and the insurers are not liable for seizure by the Portuguese for illicit trade," the main question was, whether an attempt to trade, not consummated by actual trading, was within the exception. The court held that it was. On that occasion, the chief justice said: "No seizure, not justifiable under the laws and regulations established by the crown of Portugal for the restriction of foreign commerce with its dependencies, can come within this part of the contract; and every seizure which is justifiable by those laws and regulations, must be deemed within it." And, applying this language to the circumstances of the present case, we may add, that no seizure or detention not justifiable by the law of nations, can come within the present exception, and every seizure which is justifiable by the law of nations, must be deemed within it. The cases of *Smith v. The Delaware Insurance Company*, 3 Serg. & Rawle, 74; and *Faudel v. The Phoenix Insurance Company*, 4 Serg. & Rawle, 29; *Johnston*

and *Weir v. Ludlow*, 1 Caines's Cas. in Error, 29; S. C. 2 Johns. Cas. 481, adopt a similar doctrine, if they do not proceed beyond it. The case of *Higginson v. Pomroy*, 11 Mass. 194, contained an exception of "illicit trade with the Spaniards;" and the court held that the exception extended to every seizure and detention suggested by the prohibitions of trade and intercourse, as the means of enforcing them; and whether of prevention or of punishment for infraction; and that, therefore, it extended to cases where the charge of illicit trade with the Spaniards might be ultimately repelled; and where the property seized might be in consequence acquitted under the circumstances of the particular case. But this supposes that there was probable or justifiable cause for the seizure bona fide existing; and the court explicitly assented to the general doctrine in *Church v. Hubbard*, 2 Cranch, 187. It is true that the learned chief justice, in delivering the opinion of the court, added that "perhaps, (we may add,) although not necessary to the present decision, even arbitrary acts of the Spanish colonial governments, if assumed to be justified on their parts by the prohibitions of trade and intercourse, are, we think, within the exception of seizure for illicit trade." This is professedly a mere dictum of the court, and giving it every reasonable force as authority, it proceeds on the supposition that such arbitrary acts are bona fide done, and are not mere pretexts to cover an illegal seizure.

The second question is, whether, assuming the other facts to be as stated and alleged above, and taking the authority of the seizing vessel to be such as the plaintiffs allege, (that is to say, of an armed vessel fitted out and commissioned at Callao by Rodil), there was a legal and justifiable cause for the seizure of *The General Carrington*.

ton and her cargo. The third is precisely the same in terms, except taking the authority of the armed vessel to be such as the defendants allege, (that is to say, to be an armed vessel sailing under the royal Spanish flag, and acting by the royal authority of Spain.)

Both these questions present the same general point, whether there was, under the circumstances of the case, a legal and justifiable cause for the seizure and detention of the ship and her cargo. The facts material to be taken into consideration in ascertaining this point are, that the ship, when seized, has not landed all her outward cargo, but was still in the progress of the outward voyage originally designated by the owners; that they sailed on that voyage from Providence with contraband articles on board, belonging, with the other parts of the cargo, to the owners of the ship, with false destination and false papers, which yet accompanied the vessel; that the contraband articles had been landed before the policy, which is a policy on time designating no particular voyage, had attached; that the underwriters, though taking no risks within the exception, were not ignorant of the nature and objects of the voyage; and that the alleged cause of the seizure and detention was, the trade in articles contraband of war by the landing of the powder and muskets already mentioned.

If by the principles of the law of nations there existed, under these circumstances, a right to seize and detain the ship and her remaining cargo, and to subject them to adjudication for a supposed forfeiture, notwithstanding the prior deposit of the contraband goods; then the questions must be answered in the affirmative, that there was a legal and justifiable cause.

According to the modern law of nations, for there has

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been some relaxation in practice from the strictness of the ancient rules, the carriage of contraband goods to the enemy, subjects them, if captured in delicto, to the penalty of confiscation; but the vessel and the remaining cargo, if they do not belong to the owner of the contraband goods, are not subject to the same penalty. The penalty is applied to the latter only when there has been some actual co-operation, on their part, in a meditated fraud upon the belligerents; by covering up the voyage under false papers, and with a false destination. This is the general doctrine when the capture is made in transitu, while the contraband goods are yet on board. But when the contraband goods have been deposited at the port of destination, and the subsequent voyage has thus been disconnected with the noxious articles, it has not been usual to apply the penalty to the ship or cargo upon the return voyage, although the latter may be the proceeds of the contraband.

And the same rule would seem, by analogy, to apply to cases where the contraband articles have been deposited at an intermediate port on the outward voyage, and before it had terminated; although there is not any authority directly in point. But in the highest prize courts of England, while the distinction between the outward and homeward voyage is admitted to govern, yet it is established, that it exists only in favor of neutrals who conduct themselves with fairness and good faith in the arrangements of the voyage. If with a view to practice a fraud upon the belligerent, and to escape from his acknowledged right of capture and detention, the voyage is disguised, and the vessel sails under false papers, and with a false destination, the mere deposit of the contraband in the course of the voyage is not allowed to purge

away the guilt of the fraudulent conduct of the neutral. In the case of *The Franklin*, in 1801, 3 Rob. 217, Lord Stowell said: "I have deliberated upon this case, and desire it to be considered as the settled rule of law received by this court, that the carriage of contraband with a false destination, will work a condemnation of the ship, as well as the cargo." Shortly afterwards, in the case of *The Neutralitet*, 1801, 3 Rob. 295, he added: "The modern rule of the law of nations is, certainly, that the ship shall not be subject to condemnation for carrying contraband goods. The ancient practice was otherwise; and it can not be denied that it was perfectly justifiable in principle. If to supply the enemy with articles is a noxious act with respect to the owner of the cargo, the vehicle which is instrumental in effecting that illegal purpose, cannot be innocent. The policy of modern times, has, however, introduced relaxation on this point; and the general rule now is, that the vessel does not become confiscated for that act. But this rule is liable to exceptions. Where a ship belongs to the owner of the cargo, or where the ship is going on such service under a false destination or false papers; these circumstances of aggravation have been held to constitute excepted cases out of the modern rule, and to continue them under the ancient rule." The cases in which this language was used, were cases of capture upon the outward trip. The same doctrine was afterwards held by the same learned judge to apply to cases where the vessel had sailed with false papers, and a false destination upon the outward voyage, and was captured on the return voyage. And finally, in the cases of *The Rosalia* and *The Elizabeth*, in 1802, 4 Rob., note to table of cases, the lords of appeal in prize cases held, that the carriage of contraband outward with false papers, will affect the return cargo with con-

demnation. These cases are not reported at large. But in the case of *The Baltic*, 1 Acton, 25, and that of *The Margaret*, 1 Acton, 333, the lords of appeal deliberately reaffirmed the same doctrine. In the latter case, Sir William Grant, in pronouncing the judgment of the court, said: "The principle upon which this and other prize courts have generally proceeded to adjudication in cases of this nature (that is where there are false papers) appears simply to be this: that if a vessel carried contraband on the outward voyage she is liable to condemnation on the homeward voyage. It is by no means necessary that the cargo should have been purchased by the proceeds of this contraband. Hence we must pronounce against this appeal; the sentence (of condemnation) of the court below being perfectly valid and consistent with the acknowledged principles of general law."

We cannot but consider these decisions as very high evidence of the law of nations, as actually administered; and in their actual application to the circumstances of the present case, they are not, in our judgment, controlled by any opposing authority. Upon principle, too, we trust, that there is great soundness in the doctrine, as a reasonable interpretation of the law of nations. The belligerent has a right to require a frank and *bona fide* conduct on the part of neutrals, in the course of their commerce in times of war; and if the latter will make use of fraud, and false papers, to elude the just rights of the belligerents and to cloak their own illegal purposes, there is no injustice in applying to them the penalty of confiscation. The taint of fraud travels with the party and his offending instrument during the whole course of the voyage, and until the enterprise has, in understanding of the party himself terminated. There

are many analogous cases in the prize law, where fraud is followed by similar penalties. Thus, if a neutral will cover up enemy's property under false papers, which also cover his own property, prize courts will not disentangle the one from the other, but condemn the whole as good prize. That doctrine was solemnly affirmed in this court, in the case of *The St. Nicholas*, 1 Wheat, 417; 3 Cond. Rep. 614.

Upon the whole our opinion is, that the general question involved in the second and third questions, whether there was a legal and justifiable cause of capture under the circumstances of the present case, ought to be answered in the affirmative. The question, as to the authority of the cruiser to seize, so far as it depends upon her commission, can only be answered in a general way. If she had a commission under the royal authority of Spain, she was beyond question entitled to make the seizure. If Rodil had due authority to grant the commission, the same result would arise. If he had no such authority, then she must be treated as a non-commissioned cruiser, entitled to seize for the benefit of the crown; whose acts, if adopted and acknowledged by the crown or its competent authorities, become equally binding. Nothing is better settled both in England and America, than the doctrine, that a non-commissioned cruiser may seize for the benefit of the government; and if his acts are adopted by the government, the property, when condemned, becomes a *droit* of the government.

The fourth and fifth questions involve the points as to the authority of Rodil. The fourth is in the following terms: Whether a general in the military service of Spain, subordinate to La Serna, viceroy of Peru, under the king of Spain, but having the actual and exclusive

command at Callao, and no civil authority existing therein, and cut off by the forces of the enemy by sea and land from all communication with any superior civil or military officer, could lawfully seize and detain neutral property for contraband trade, if just cause existed for a condemnation thereof. The fifth question is, whether such officer, so situated, has a right to appoint and constitute a court, of which he himself is one, for the trial and condemnation of such property. These questions are both understood to refer to the supposed authority of Rodil as an officer of the government, to make the seizure in his official capacity. We are of opinion, that no sufficient facts are stated to enable this court to give any opinion as to the nature or extent of the authority of such an officer under the laws of Spain, or his commission from and under the Spanish government. We shall, therefore, return an answer to them, declaring that they are too imperfectly stated to admit of any opinion to be given by this court.

The sixth and last question is, whether, supposing the ship to have traded in articles contraband of war in the ports of Chili, and to have been seized afterwards in a port of Peru, then under the royal authority, before she had discharged her outward cargo, for and on account of such contraband trade, the underwriters be not discharged whether the subsequent proceedings for her adjudication were regular or irregular. This question is understood to raise the point, whether, if the seizure and detention be bona fide for and on account of illicit or contraband trade, a sentence of condemnation or acquittal, or other regular proceedings to adjudication, are necessary to discharge the underwriters. We are of the opinion that they are not. If the seizure or de-



tention be lawfully made for or on account of illicit or contraband trade, all charges, damages and losses consequent thereon, are within the scope of the exception. They are properly attributable to such seizure and detention as the primary cause, and relate back thereto. If the underwriters be discharged from the primary hostile act they are discharged from the consequences of it. The whole reasoning in *Church v. Hubbard*, 2 Cranch, 187, presupposes that if the underwriters be exempted from the risk of a justifiable seizure for illicit trade, they are not accountable for losses consequent thereon whether arising from a sentence of condemnation or otherwise.

## THE PANAMA.

(176 U. S. 536.)

WHAT AMOUNT OF ARMAMENT WILL MAKE A VESSEL CONTRABAND SO AS TO TAKE IT OUT OF THE OPERATION OF A PROCLAMATION EXCEPTING "MERCHANT VESSELS."

Mr. Justice Gray delivered the opinion of the court.

This was a libel for the condemnation of the steamship *Panama* as prize of war, and was heard in the district court upon the libel, the claim of the master in behalf of the owner of the vessel, and the depositions *in preparatorio* of her master, her supercargo, and her chief engineer, which showed the following state of facts:

The *Panama* was a steamship of 1432 tons register; was owned by the *Compania Transatlantica*, a corporation of Barcelona in Spain; sailed under the Spanish flag; had a commission as a royal mail ship from the Government of Spain; carried a crew of 71 men all told, who had been shipped at different times at Havana; and

her usual course of voyage included the ports of New York and Havana, and Progreso, Vera Cruz, and other Mexican ports, with general cargoes, passengers and mails.

Her last voyage began in Havana, for a round trip by way of New York, and was to have ended in Vera Cruz. She sailed from New York at half-past two o'clock in the afternoon of April 20, 1898, with a clearance from the custom house at that port for Havana, Progreso, and Vera Cruz, having on board the United States mails, 29 passengers (all Spaniards except one Frenchman) and a general cargo, the produce or manufacture of the United States, shipped to consignees at those ports. She pursued the usual course of a ship bound southward along the coast until she passed Alligator Reef light on the coast of Florida, and then bore away for Havana, and sighted the Cuban coast on the morning of April 25; and on that day, when about twenty-five miles from Havana, was captured by the United States ship of war *Mangrove*, and was sent in charge of a prize crew into Key West. She had no military or naval officer on board, made no resistance to the capture, and delivered all her papers and mails to the prize master.

There were mounted on board the *Panama*, at the time of her capture, five guns: two breech-loading Hotchkiss 9 centimetre guns, one on each side of the ship, with 30 rounds of shot for each; one Maxim rapid-firing gun, on the bridge, with ammunition; and two signal guns, one on each side of the pilot house, with ammunition. She also had on board about twenty Remington rifles and ten Mauser rifles, with ammunition for each, and about thirty or forty cutlasses. The cannon had

been put on board about three years before, and the small arms and ammunition had been on board a year or more. She was so armed in accordance with a contract with the Spanish Government, which required all the mail steamships of the company to be armed, and article 26 of which was as follows: "Every ship shall take on board, for her own defense, the following armament: Two Hontoria 9 centimetre guns, with powder and ammunition for 30 shots for each piece; twenty Remington rifles, with 899 rounds apiece, and bayonet or sword-bayonet; and twenty cutlasses."

The master of the Panama moved the court to allow further proof upon the matters set forth in two test affidavits, filed by leave of the court, in which he testified more distinctly that the mounted guns and small arms which the Panama carried had not been shipped for the purpose of war, or in expectation of hostilities between the Spanish Government and the United States, but were taken on board pursuant to the requirements of that contract; and also testified that the Spanish Government had never taken possession of the Panama under the terms of the contract; and that until the capture he and his officers were ignorant of the existence of the war between Spain and the United States and of any blockade of the port of Havana. And he asked leave to submit to the court the whole contract, as contained in a printed book, which was in the chart room of the Panama, and in the custody of the prize master, and which has since been sent up to this court as one of the exhibits in the cause.

By the contract, concluded between the Spanish Government and the Compania Transatlantica on November 18, 1886, and drawn up and printed in Spanish, the

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company bound itself to establish and to maintain for twenty years various lines of mail steamships, one of which included Havana, New York and other ports of the United States and of Mexico; and the Spanish Government agreed to pay certain subsidies to this company, and not to subsidize other steamship lines between the same points. Among the provisions of the contract, besides article 26, above quoted, were the following:

By article 25, new ships of the West Indian line must be of iron, or of the material which experience may prove to be the best; must have double-bottomed hulls, divided into watertight compartments, with all the latest improvements known to the art of naval construction; and "their decks and sides shall have the necessary strength to support the artillery that they are to mount." All the ships of that line must have a capacity for 500 enlisted men on the orlop deck, and a convenient place for them on the main deck. The company, when beginning to build a ship, shall submit to the Minister of the Colonies her plans as prepared for commercial and postal service; "the Minister shall cause to be studied the measures that should be taken looking to the rapid mounting in time of war of pieces of artillery on board of said vessel; and may compel the company to do such strengthening of the hull as he may deem necessary for the possible mounting of that artillery; said strengthening shall not be required for a greater number than six pieces whose weight and whose force of recoil do not exceed those of a piece of fourteen centimetres." The plan of ships already built shall be submitted to the Minister of Marine, in order that he may cause to be studied the measures necessary to adapt them to war service; and any changes that he may deem necessary or possible for

that end shall be made by the company. But in both old and new ships the changes proposed by the Ministry must be such as not to prejudice the commercial purposes of the vessels.

By article 35, the vessels, with their engines, armaments and other appurtenances, must be constantly maintained in good condition for service.

By article 41, the officers and crews of the vessels, and, as far as possible, the engineers, shall be Spaniards.

By article 49, the company may employ its vessels in the transportation of all classes of passengers and merchandise, and engage in all commercial operations that will not prejudice the services that it must render to the State.

By article 60, when by order of the Government, munitions of war shall be taken on board, the company may require that it be done in the manner and with the precautions necessary to avoid explosions and disasters.

By article 64, in case of the suspension of the mail service by a naval war, or by hostilities in any of the seas or ports visited by the company's ships, the Government may take possession of them with their equipment and supplies, having a valuation of the whole made by a commission composed of two persons selected by the Government, two by the company, and a fifth person chosen by those four; at the termination of the war, the vessels with their equipment are to be returned to the company, and the Government is to pay to the company an indemnity for any diminution in their value, according to the opinion of the commission, and is also, for the time it has the vessels in its service, to pay five per cent on the valuation aforesaid. By article 66, at the end of the war, the Government may relieve the com-

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pany of the performance of the contract if the casualties of the war have disabled it from continuing the service. And by article 67, in extraordinary political circumstances, and though there be no naval war, the Government may charter one or more of the company's vessels, and in that event shall pay an indemnity estimated by the aforesaid commission.

The District Court denied the motion of the master to take further proof; restored parts of the cargo to claimants thereof; gave claimants of other parts of the cargo leave to introduce further proof; and entered a final decree of condemnation and sale of the Panama and the rest of her cargo, upon the ground that she was enemy's property, and was upon the high seas at the time of the President's proclamation exempting certain vessels from arrest. 87 Fed. Rep. 927. The court also, on the application of the commodore commanding at Key West, and on the recommendation of the prize commissioners, ordered all the mounted guns and the ammunition therefor to be appraised by two officers of the Navy and delivered to the commodore for the use of the Navy Department. The master of the Panama appealed to this court from the decree condemning the vessel.

The recent war with Spain, as declared by the act of Congress of April 25, 1898, c. 189, and recognized in the President's proclamation of April 26, 1898, existed on and after April 21, 1898. 30 Stat. 364. This proclamation declared among the rules on which the war would be conducted, the following:

"4. Spanish merchant vessels, in any ports or places within the United States, shall be allowed till May 21, 1898, inclusive, for loading their cargoes and departing from such ports or places; and such Spanish mer-

chant vessels, if met at sea by any United States ship, shall be permitted to continue their voyage if, on examination of their papers, it shall appear that their cargoes were taken on board before the expiration of the above term: Provided, that nothing herein contained shall apply to Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for their voyage) or any other article prohibited or contraband of war, or any despatch of or to the Spanish Government.

"6. The right of search is to be exercised with strict regard for the rights of neutrals, and the voyages of mail steamers are not to be interfered with except on the clearest grounds of suspicion of a violation of law in respect of contraband or blockade."

It has been decided by this court in the recent case of *The Buena Ventura*, 175 U. S. 384, that a Spanish merchant vessel, which had sailed before April 21, 1898, from a port of the United States on a voyage to a foreign port, not having on board any officer in the military or naval service of Spain, nor any article contraband of war, nor any despatch of or to the Spanish government, was protected by the fourth clause of the President's proclamation of April 26, 1898, from condemnation while on that voyage; but that her capture before that proclamation was issued, was with probable cause; and that she would therefore be ordered to be restored to her owner, but without damages or costs.

That case would be decisive of this one, but for the mails and the arms carried by the *Panama*, and the contract with the Spanish government under which the arms were put on board.

It was argued in behalf of the claimant that, inde-

pendently of her being a merchant vessel, she was exempt from capture by reason of her being a mail steamship and actually carrying mail of the United States.

There are instances in modern times, in which two nations, by convention between themselves, have made special agreements concerning mail ships. But international agreements for the immunity of the mail ships of the contracting parties in case of war between them have never, we believe, gone farther than to provide, as in the postal convention between the United States and Great Britain in 1848, in that between Great Britain and France in 1833, and in other similar conventions, that the mail packets of the two nations shall continue their navigations, without impediment or molestation, until a notification from one of the governments to the other that the service is to be discontinued; in which case they shall be permitted to return freely and under special protection, to their respective ports. And the writers on international law concur in affirming that no provision for the immunity of mail ships from capture has as yet been adopted by such a general consent of civilized nations as to constitute a rule of international law. 9 Stat. 969; Wheaton (8th ed.) pp. 659-661, Dana's note; Calvo (5th ed.), 2378, 2809, De Boeck, 207, 208. De Boeck, in section 208, after observing that, in the case of mail packets between belligerent countries, it seems difficult to go farther than in the convention of 1833, above mentioned, proceeds to discuss the case of mail packets between a belligerent and a neutral country as follows: "It goes without saying that each belligerent may stop the departure of its own mail packets. But can either intercept enemy mail packets? There can be no question of intercepting neutral packets, because



communications between neutrals and belligerents are lawful, in principle, saving the restrictions relating to blockade, to contraband of war, and the like; the right of search furnishes belligerents with a sufficient means of control. But there is no doubt that it is possible, according to existing practice, to intercept and seize the enemy's mail packets."

The provision of the sixth clause of the President's proclamation of April 26, 1898, relating to interference with the voyages of mail steamships, appears by the context to apply to neutral vessels only, and not to restrict in any degree the authority of the United States, or of their naval officers, to search and seize vessels carrying the mail between the United States and the enemy's country. Nor can the authority to do so, in time of war, be affected by the facts that before the war a collector of customs had granted a clearance, and a postmaster had put mails on board, for a port which was not then, but has since become enemy's country. Moreover, at the time of the capture of the *Panama*, this proclamation had not been issued. Without an express order of the Government, a merchant vessel is not privileged from search or seizure by the fact that it has government mail on board. *The Peterhoff*, 5 Wall. 28, 61.

The mere fact, therefore, that the *Panama* was a mail steamship, or that she carried mail of the United States on this voyage, does not afford any ground for exempting her from capture.

The remaining question in the case is whether the *Panama* came within the class of vessels described in the fourth clause of the President's proclamation of April 26, 1898, as "Spanish merchant vessels," and as not Spanish vessels having on board any officer in the

military or naval service of the enemy, or any coal (except such as may be necessary for their voyage) or any other article prohibited or contraband of war, or any despatch of or to the Spanish Government.

On the part of the claimant, it was argued that the arms which the *Panama* carried, under the requirements of her mail contract and for the protection of the mails, are not to be regarded as contraband or munitions of war, within the sense of this clause: that "contraband," as therein referred to means contraband cargo, not contraband portion of the ship's permanent equipment; and that, if the furnishings of a ship could be regarded as contraband, every ship would have contraband on board.

On the other hand, it was contended, in support of the condemnation, that the arms which the *Panama* carried, belonging to her owner, were contraband of war, and rendered her liable to capture; and that by reason of her being so armed, and of the provisions of her mail contract with the Spanish Government, requiring her armament, and recognizing the right of that government, in case of a suspension of the mail service by war, to take possession of her for warlike purposes, she can not be considered as a merchant vessel, within the meaning of the proclamation, but must be treated like any regular vessel of the Spanish navy under similar circumstances.

The claimant much relied on a case decided in 1800 by the French Council of Prizes, in accordance with the opinion and report of Portalis, himself a high authority. Wheaton (8th ed.), p. 460; De Boeck, 81. In the case referred to, an American vessel, carrying ten cannon of various sizes together with muskets and munitions of

war, had been captured by French frigates; and had been condemned by two inferior French tribunals, upon the ground that she was armed for war, and had no commission or authority from her own government. The claimants contended that their ship, being bound for India, was armed for her own defence, and that the munitions of war, the muskets and the cannon that composed her armament did not exceed what was usual in like cases for long voyages. Upon this point, Portalis, acting as commissioner of the French government, reported his conclusion on the question of armament as follows: "For my part, I do not think it is enough to have or to carry arms, to incur the reproach of being armed for war. Armament for war is of a purely offensive nature. It is established when there is no other object in the armament than that of attack, or at least when everything shows that such is the principal object of the enterprise; then a vessel is deemed enemy or pirate, if she has no commission or papers sufficient to remove all suspicion. But defence is a natural right, and means of defence are lawful in voyages at sea, as in all other dangerous occupations of life. A ship which had but a small crew, and a considerable cargo, was evidently intended for commerce, and not for war. The arms found on this ship were evidently intended, not for committing acts of rapine or hostility, but for preventing them; not for attack, but for self-defence. The pretext of being armed for war therefore appears to me to be unfounded." The Council of Prizes, upon consideration of the report or Portalis, adjudged that the capture of the vessel and her cargo was null and void, and ordered them to be restored, with damages. The *Pegou*, or *Pigou*, 2 Pistoye

et Duverdy, *Prises Maritimes*, 51; S. C. 2 Cranch, 96-98, and note.

But in that case the only question at issue was whether a neutral merchant vessel, carrying arms solely for her own defence, was liable to capture for want of a commission as a vessel of war or privateer. That the capture took place while there was no state of war between France and the United States is shown by her being treated, throughout the case, as a neutral vessel; if she had been enemy's property, she would have been lawful prize, even if she had a commission, or if she were unarmed. She was not enemy's property, nor in the enemy's possession nor bound to a port of the enemy; nor had her owner made any contract with the enemy by which the enemy was, or would be, under any circumstances, entitled to take and use her, either for war, or for any other purpose.

Yet it must be admitted that arms and ammunition are not contraband of war, when taken and kept on board a merchant vessel as part of her equipment, and solely for her defence against "enemies, pirates and assailing thieves," according to the ancient phrase still retained in policies of marine insurance. Pratt, in his essay on the Law of Contraband of war, speaking of the class of "articles which are of direct use in war," says: "With respect to these no questions can arise. On proof of the use of the article being solely or particularly applicable to hostile purposes, the conveyance of it to the enemy would amount to such a direct interposition in the war as necessarily to entail the confiscation of the property." But he afterwards adds this qualification: "But even in the case of articles of direct use in war, an exception is always made in favor of such a quantity

of them as may be supposed to be necessary for the use or defence of the ship." And again, speaking of "warlike stores," he says: "These are, from their very nature, evidently contraband, but every vessel is, of course, allowed to carry such a quantity as may be necessary for purpose of defence; this provision is expressly introduced in many treaties." Pratt *Contraband of War*, xxii, xxv, xl. And at pages 239, 244, 245 of his appendix he quotes express provisions to that effect in the treaties between Great Britain and Russia in 1766, 1797 and 1801. See also *Case of Dutch and Spanish Ships*, 6 C. Rob. 48; *The Happy Couple*, Stewart Adm. (Nova Scotia) 65, 69; Madison quoted in 3 Whart. Int. Law Dig. 368, p. 313.

But the fact that arms carried by a merchant vessel were originally taken on board for her own defence is not conclusive as to her character. This is clearly shown by the case of *The Amelia*, (1801) reported by the name of *Talbot v. Seeman*, 1 Cranch, 1. In that case, during the naval warfare between the United States and France near the end of the last century, a neutral merchant vessel, having eight iron cannon and eight wooden guns mounted on board, and a cargo of merchandise, sailed from Calcutta for Hamburg, both being neutral ports; and before reaching her destination was captured by a French cruiser, and put by her captors, with the cannon still on board, in charge of a French prize crew, with directions to take her into a French port for adjudication as prize; and on her way thither was recaptured by a United States ship of war. The recapture was held to be lawful, and to entitle the recaptors to salvage before restoring the vessel to her neutral owner, because, as Chief Justice Marshall said, "*The Amelia*

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was an armed vessel commanded and manned by Frenchmen," "she was an armed vessel under French authority, and in a condition to annoy American commerce." 1 Cranch, 32. And in *The Charming Betsy*, (1804), 2 Cranch, 64, that case was expressly approved, as a precedent to be followed under similar circumstances; but was held to be inapplicable where the arms on board at the time of the recapture were but a single musket and a small amount of powder and ball. 2 Cranch, 121. Notwithstanding that the *Amelia* was a neutral vessel, with an armament originally taken on board for defence only, and therefore while in the possession of her neutral owner, would not (according to the French case above cited) have been liable to capture as an armed vessel, yet after she had been taken possession of by the enemy, with the same armament still on board, and thus was in a condition to be used by the enemy for hostile purposes, the fact that the original purpose of the armament was purely defensive did not prevent her from being considered as an armed vessel of the enemy.

While the authorities above referred to present principles and analogies worthy of consideration in the case at bar, they furnish no conclusive rule to govern its determination. The decision of this case must depend upon its own facts, and upon the true construction of the Presidents' proclamation.

As to the facts, there is no serious dispute. The matters stated in the test affidavits upon which the motion for further proof was based, add nothing of importance to the facts disclosed by the testimony *in preparatorio*. and by the mail contract between her owner and the Spanish Government, which forms part of the ship's papers.

That contract contains many provisions looking to the use of the company's steamships by the Spanish Government as vessels of war. Among other things it requires that each vessel shall have the capacity to carry 500 enlisted men; that the government, upon inspection of her plans as prepared for commercial and postal purposes, may order her deck and sides to be strengthened so as to support additional artillery; and that, in case of the suspension of the mail service by a naval war or by hostilities in any of the seas or ports visited by the company's vessels, the Government may take possession of them with their equipment and supplies, at a valuation to be made by a commission; and shall, at the termination of the war, return them to the company, paying five per cent on the valuation while it has them in its service, as well as an indemnity for any diminution in their value.

The Panama was not a neutral vessel; but she was enemy property, and as such, even if she carried no arms (either as part of her equipment or as cargo), would be liable to capture, unless protected by the President's proclamation.

It may be assumed that a primary object of her armament, and, in time of peace, its only object, was for purposes of defence. But that armament was not of itself inconsiderable, as appears, not only from the undisputed facts of the case, but from the action of the District Court, upon the application of the commodore commanding at the port where the court was held, and on the recommendation of the prize commissioners, directing her arms and ammunition to be delivered to the commodore for the use of the Navy Department. And the contract of her owner with the Spanish Government,

pursuant to which the armament had been put on board, expressly provided that, in case of war, that government might take possession of the vessel with her equipment, increase her armament, and use her as a war vessel; and, in these and other provisions, evidently contemplated her use for hostile purposes in time of war.

She was, then, enemy property, bound for an enemy port, carrying an armament susceptible of use for hostile purposes, and herself liable, upon arrival in that port, to be appropriated by the enemy to such purposes.

The intent of the fourth clause of the President's proclamation was to exempt for a time from capture peaceful commercial vessels; not to assist the enemy in obtaining weapons of war. This clause exempts "Spanish merchant vessels" only; and expressly declares that it shall not apply to "Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for their voyage) or any other article prohibited or contraband of war, or any despatch of or to the Spanish Government.

Upon full consideration of this case, this court is of opinion that the proclamation, expressly declaring that the exemption shall not apply to any Spanish vessel having on board any article prohibited or contraband of war, or a single military or naval officer, or even a despatch, of the enemy, cannot reasonably be construed as including, in the description of "Spanish merchant vessels" which are to be temporarily exempt from capture, a Spanish vessel owned by a subject of the enemy, having an armament fit for hostile use; intended, in the event of war, to be used as a war vessel; destined to a port of the enemy; and liable, on arriving there, to be taken possession of by the enemy, and employed as an



auxiliary cruiser of the enemy's navy, in the war with this country.

The result is, that the Panama was lawfully captured and condemned, and that the decree of the District Court be affirmed.

#### THE CAROLINA.

(4 Robinson's Admiralty Reports, 210.)

#### THE PENALTY FOR ALLOWING A SHIP TO BE USED AS A TRANSPORT.

##### Judgment.

Sir W. Scott.—The ship is stated by the master's account to be a Swedish ship, chartered by ———, of Leghorn, to go on a voyage to Civita Vecchia, with other covenants not to go to a blockaded port, or to carry contraband articles. The particulars of his representation are, "that on the 26th of March, 1798, his ship was chartered by P. Jaumer, a merchant of Leghorn, for four months, at 1,250 piasters per month, to go on a trading voyage between Leghorn, Civita Vecchia and the adjacent ports, as the freighters should direct, with the exception of not going to French ports, or ports that were blockaded, and also of not carrying contraband goods or stores: That he sailed accordingly from Leghorn to Civita Vecchia on the 9th of April, 1798, and on his arrival at the last mentioned port was informed that an embargo had been laid upon all vessels in that port: That he was then summoned before the French agent of ———, who showed him a letter from ———, addressed to the said master, and informing him that citizen D———, was to be the lader of the cargo in Civita Vecchia, and that he must hold his ship in readiness at the disposal of the French commissary." He then states,

“that he went to Rome to solicit the interference of the Swedish Consul, but could not find him, and when he returned he found his ship fitted as a transport: That being unable to avoid this service, he caused an insurance to be made for the benefit of his owner, and was ordered to victual his vessel for two months: That he took on board 150 dragoons and sailed with 57 other vessels, but he did not know on what destination: That on his arrival at *Alexandria*, he applied for payment and for his discharge, but was put off.” It does not appear that the master made any protest or remonstrance against this service; but rather in proof of his voluntary assent, he proceeded to insure the vessel, and to provide the necessary provisions for the voyage. It is now, however, said, that this was an act under duress, and that it is a by-gone transaction. On the former part of this representation my opinion is, that a man cannot be permitted to aver, that he was an involuntary agent in such a transaction. If an act of force, exercised by one belligerent on a neutral ship or person, is to be deemed a sufficient justification for any act done by him, contrary to the known duties of the neutral character, there would be an end of any prohibition under the law of nations to carry contraband or to engage in any other hostile act. If any loss is sustained in such a service, the neutral yielding to such demands, must seek redress against the Government that has imposed the restraint upon him. He has no right to expect that the *British* government should pay for the injustice of its public enemy. If this vessel had been taken in *delicto*, I should have felt no hesitation in saying that she must have been subject to condemnation. Whether the troops

were received on board voluntarily, could make no difference.

Then as to its being a by-gone transaction, had she divested herself of the character of a *French* transport? Had she so receded from that character, as is represented? She was remaining under the power of the *French* military commander as much as ever. She had solicited leave to depart, but could not obtain it; and if the *English* fleet had not appeared, she might have been employed to carry on the dragoons to some other place, in the same manner as she had been employed before. I can by no means accede to the description given in argument, or consider her as having removed herself from all taint, arising out of the preceding contract. When the *British* fleet appeared before Alexandria, the British commander did, with a tenderness to neutral commerce, which is highly honorable to him, give liberty to neutral vessels to depart. But although this notice was given in general terms, to neutral ships, it was not given absolutely to all that were neutral in built and property, but to such as were neutral likewise in their conduct, and were acting fairly under that character. The very terms of the letter are, "to all such as are legally employed." This ship was still subservient to the purposes of the French commander, who refused to let her depart, till the arrival of the British fleet rendered it impossible for him to make any farther use of the vessel. Under these circumstances, what right or pretence had this vessel to claim the privileges which belonged only to those who had conducted themselves as neutral, or to claim the protection of that proclamation? On the first attempt to come out it appears she was taken, and under circumstances which do, in my opinion, fully justify the seizure. But it is said the captors were in fault,

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for not proceeding immediately to adjudication. It must be conceded, I think, as a reasonable distinction, that commanders acting in the management of great expeditions, cannot be tied down exactly to the same rules by which individual cruisers are directed to proceed. If the vessel had been brought to adjudication, so far am I from thinking that it would have availed the claimants, that it rather appears to me there would have been strong grounds on which the captors might have been entitled to condemnation. It is said that the master was separated from his ship—but if we consider that he was a person who had appeared to engage his vessel voluntarily as a French transport, there might be very good reasons why it would not be improper to remove such a person. On the whole, I can by no means hold that this is a demand fit to be enforced in this court.

It appears that there were on board some bills of exchange on the French Government; and it is made part of the prayer of the claimant, that the court will direct the captors to deliver them up. On what grounds can it be expected that this court will busy itself to assist in enforcing a demand for what is to be considered as the *pretium laesae fidei*? Is there a principle more universal than that Courts of justice will *not* carry into effect an illegal contract? In some instances it may have been doubted, whether the Court of Prize can properly take notice of a breach of our own municipal laws. But in respect to the law before us can it be said that the Court of Admiralty shall lend its aid to carry into effect a contract which is in direct violation of the law of nations, that very law which it sits to administer? The parties must resort to the French Government, and settle their accounts with them as well as they can. I have

no hesitation in rejecting the whole of this petition, with costs of the petition against the claimant.

THE ATLANTA.

(6 Robinson's Admiralty Reports, 440.)

CARRIAGE OF DISPATCHES FOR THE ENEMY BY NEUTRAL  
VESSELS.

Judgment.

Sir William Scott.—This ship, or rather that of which this is the representative, sailed from Bremen, with a cargo of dry goods and provisions, part of which had been brought from Amsterdam, on the 23rd of July, 1805. She touched at the Cape of Good Hope, and from thence proceeded to Batavia, where the cargo was sold, and another cargo taken in for Tranquebar. From that place a return cargo was again brought to Batavia, where the present cargo of coffee and sugar was purchased, with which the ship sailed, on her return to the river Jade, in December, 1806. It appears that the voyage was interrupted by a violent tempest or hurricane, which visited those seas at that time, and the vessel was driven, by distress, into the Isle of France where she was sold, as not seaworthy and the present vessel was purchased, which sailed with the cargo that had been transhipped, on the 12th of May, 1807. The original master had died at Tranquebar, where the present master was appointed in his place by the two supercargoes who were on board, and whose conduct will constitute the chief subject of observation in the present inquiry. The capture was made on the 14th of July, by the *Argo*, a private ship of war, being on her return from the South Whale Fishery. The ship's papers were demanded in the usual manner; and again afterwards, on the 5th of September, there

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was a farther demand, on the supposition that the former had not been complied with. The mate and four men were put on board the *Argo*, who carried the vessel to St. Helena, where they met his majesty's ship, the *Sir Edward Hughes*, under the convoy of which ship they afterwards proceeded to England.

In the course of the voyage some apprehensions began to be entertained of a meditated rescue, whether well-founded or not does not appear; it was the cause, however, that led to a request, that Mr. Meinen, the other supercargo, might be removed on board the *Sir Edward Hughes*, and that his baggage might be examined for concealed papers, though it is not explained what had given rise to a suspicion of this kind. On this search was found, in the possession of Mr. Meinen, in his trunk, a small tea chest, at the bottom of which were discovered those papers which were sent by Captain Ratsey, of the *Sir Edward Hughes*, to the admiralty; and which are described, in the letter from the secretary of state's office, "to contain despatches from the governor of the Isle of France to the different departments of government in Paris, stating the distress of the colony, and requesting assistance to preserve the settlement from ruin."

This being the fact, then, that there was on board public despatches of the enemy, not delivered up with the ship's papers, but found concealed, it is incumbent upon the persons entrusted with the care of the ship and her cargo to discharge themselves from the imputation of being concerned in the knowledge and management of this transaction; and more particularly, they might be expected to do this on their examination, which contains some interrogatories that point to the delivery of all papers.

On these grounds, attending to the facts of the delivery

to Gantt, of a delivery from him to Richmond, and finally from Richmond to Meinen, I feel myself bound to pronounce that there were papers received on board as public despatches, and knowingly by those who are agents of the proprietors, that these affidavits are utterly unworthy of credit, and that the fact of fraudulent concealment and suppression is most satisfactorily demonstrated.

The question then is, what are the legal consequences attaching to such a criminal act? for that it is criminal and most noxious is scarcely denied. What might be the consequences of a simple transmission of despatches, I am not called upon by the necessities of the present case to decide, because I have already pronounced this to be a fraudulent case. That the simple carrying of despatches, between the colonies and the mother country of the enemy, is a service highly injurious to the other belligerent, is most obvious.

It has accordingly been so held in decided cases, that fully recognize the principle; for on this principle the Constitution, *Tate*, was condemned.

Unless, therefore, it can be said that there must be a plurality of offenses to constitute the delinquency, it has already been laid down by the superior court, in the Constitution, that the fraudulent carrying the despatches of the enemy is a criminal act, which will lead to condemnation. Under the authority of that decision then I am warranted to hold, that it is an act which will affect the vessel, without any fear of incurring the imputation, which is sometimes strangely cast upon this Court, that it is guilty of interpolations in the laws of nations. If the court took upon itself to assume principles in themselves novel, it might justly incur such an imputation; but to apply established principles to new

cases, can not be so considered. All law is resolvable into general principles; the cases which may arise under new combinations of circumstances, leading to an extended application of principles, ancient and recognized, by just corollaries, may be infinite; but so long as the continuity of the original and established principles is preserved pure and unbroken, the practice is not new, nor is it justly chargeable with being an innovation on the ancient law; when, in fact, the court does nothing more than apply old principles to new circumstances. If, therefore, the decision, which the court has to pronounce in this case, stood on principle alone, I should feel no scruple in resting it on the just and fair application of the ancient law. But the fact is, that I have the direct authority of the superior court for pronouncing, that the carrying the despatches of the enemy, brings on the confiscation of the vehicle so employed.

It is said that this is more than is done even in cases of contraband; and it is true, with respect to the very lenient practice of this country, which in this matter recedes very much from the correct principle of the law of nations, which authorizes the penalty of confiscation. This is rightly stated, by Bynkershoek, to depend on this fact, whether the contraband is taken on board with the actual or presumed knowledge of the owner; I say presumed knowledge, because the knowledge of the master is, in law, the knowledge of the owner; "*si sciverit, ipse est in dolo, et navis publicabitur.*" This country, which, however much its practice may be misrepresented by foreign writers, and sometimes by our own, has always administered the law of nations with lenity, adopts a more indulgent rule, inflicting on the ship only a forfeiture of freight in ordinary cases of contraband. But



the offence of carrying despatches is, it has been observed, greater. To talk of the confiscation of the noxious article, the despatches, which constitutes the penalty in contraband, would be ridiculous. There would be no freight dependent on it, and therefore the same precise penalty cannot, in the nature of things, be applied. It becomes absolutely necessary, as well as just, to resort to some other measure of confiscation, which can be no other than that of the vehicle.

Then comes the other question, whether the penalty is not also to be extended further, to the cargo, being the property of the same proprietors; not merely *ob continentiam delicti*, but likewise because the representatives of the owners of the cargo are directly involved in the knowledge and conduct of this guilty transaction? On the circumstances of the present case I have to observe, that the offence is as much the act of those who are the constituted agents of the cargo, as of the master, who is the agent of the ship. The general rule of law is, that where a party has been guilty of an interposition in the war, and is taken in delicto, he is not entitled to the aid of the court, to obtain the restitution of any part of his property involved in the same transaction. It is said that the term "interposition in the war" is a very general term, and not to be loosely applied. I am of opinion that this is an aggravated case of active interposition in the service of the enemy, concerted and continued in fraud, and marked with every species of malignant conduct. In such a case I feel myself bound, not only by the general rule, *ob continentiam delicti*, but by the direct participation of guilt in the agents of the cargo. Their own immediate conduct not only excludes all favorable distinction, but makes them pre-eminently the object of just punishment. The conclusion there-

fore is that I must pronounce the ship and cargo subject to condemnation.

THE NEUTRALITET.

(8 Robinson's Admiralty Reports, 239.)

PENALTY FOR CARRYING CONTRABAND.

This was a case of a Danish ship taken with a cargo of tar on a voyage from Archangel to Dordrecht. The ship had been a Dutch vessel, and was asserted to have been purchased by Mr. Schultz of Altona. She then went from Holland to Altona, and was from thence sent on to Archangel, to carry a cargo to Dordrecht, under a charter party made by the asserted owner.

Judgment.

Sir W. Scott.—The modern rule of the law of nations is, certainly, that the ship shall not be subject to condemnation for carrying contraband articles. The ancient practice was otherwise, and it cannot be denied that it was perfectly defensible on every principle of justice. If to supply the enemy with such articles is a noxious act with respect to the owner of the cargo, the vehicle which is instrumental in effecting that illegal purpose cannot be innocent. The policy of modern times has, however, introduced a relaxation on this point; and the general rule now is, that the vessel does not become confiscable for that act. But this rule is liable to exceptions: Where a ship belongs to the owner of the cargo, or where the ship is going on such service, under a false destination or false papers; these circumstances of aggravation have been held to constitute excepted cases out of the modern rule, and to continue them under the ancient one. The circumstances of the present case compose a case of exception also; for it is a case of singular misconduct on the part of the asserted ship owners.

They are subjects of Denmark, and as such are under the peculiar obligations of a treaty not to carry goods of this nature for the use of the enemies of Great Britain.

A reference has been made to ancient cases of Dantzick ships, which were restored, though taken carrying masts to Cadiz. The particulars of those cases are not very exactly stated; but they were clearly the cases of proprietors exporting the produce of their own territory or of neighboring ports, without the breach of any obligation but such as the general law of nations imposed. In this instance the ship was freighted at Altona, to go to Archangel, for the purpose of carrying a cargo of tar to Holland, which is a commerce expressly prohibited by the Danish treaty. Tar is an article which a Danish ship cannot lawfully carry to an enemy's port; even when it is the produce and manufacture of Denmark. This ship goes to a foreign port, to effect that which she is prohibited from doing, even for the produce of her own country; in this respect, throwing off the character of a Danish ship by violating the treaties of her country; and all this is done, with the full privacy of the asserted owner, who is the person entering into the charter party. In such a case as the present, the known ground on which the relaxation was introduced, the supposition that freights of noxious or doubtful articles might be taken, without the personal knowledge of the owner entirely fails; and the active guilt of the parties is aggravated by the circumstances, of its being a criminal traffic in foreign commodities, and in breach of explicit and special obligations. The confiscation of a ship so engaged will leave the general rule still untouched, that the carriage of contraband works a forfeiture, of freight and expenses but not of the ship.

Ship condemned.

## CHAPTER III.

### BLOCKADE.

#### SEC. I. FICTITIOUS BLOCKADE.

**Origin of fictitious blockade.** As the simplest form of blockade is a fictitious or paper blockade, it is fitting that we discuss this form first. According to Calvo this form of blockade originated as early as the middle of the fourteenth century, and is traceable to a decree issued by Edward III, in 1346, declaring that "every foreign vessel which tried to enter a French port would be taken and burned." Thus says Calvo, "by a stroke of the pen was an entire kingdom put in a state of blockade more than five centuries ago, and is without doubt the origin, the first thought of this system of blockade on paper, or by cabinet, which the English have endeavored to make prevail up to recent times."

**Early instances of fictitious blockade.** About two centuries later Sweden resorted to it in her war with Russia; and in 1584 the Dutch declared all the ports of Flanders in a state of blockade. A part of the decree of the Dutch government instituting the blockade is as follows: The States-General of the United Provinces have after mature deliberation and on the advice of the respective colleges of the admiralty, found that neutral vessels which shall be found going out of the enemy ports of Flanders or which are so near that it is certain that they wish to enter, that those vessels with their merchandise ought to be confiscated. "Their High Mightinesses declare that neutral vessels and merchandise will be confiscated when it appears by the invoices or other documents that they have been loaded in the ports of France or that they are destined to go there, even though met far from there in a way

(652)

that they could still change their route and intention. This rests upon the fact that they have already tried something illicit, and put in motion although they have not finished or carried to the last point of perfection their undertaking." Bynkershoek, who attempted to justify the action taken by his government, was forced to admit that for some time the blockade was not supported by the presence of a sufficient force. In 1652, the States-General declared the ports of Great Britain and her possessions in a state of blockade.

The treaty of Whitehall, 1789, contains the following provision with reference to blockades: "Considering how important it is to the King of England and the States-General to do as much damage as possible to the common enemy in order to reduce him to a just and honorable peace and to those conditions which can re-establish the rest and quiet of Christianity and that to this end it is necessary that one employ all his force and particularly to cut off and interdict all commerce and traffic with the subjects of the very Christian King in order to take away from him and his subjects the means of carrying on a war which might otherwise cause a great effusion of Christian blood."

Treaty of  
Whitehall.

In 1693, Sweden and Denmark entered into a treaty for the purpose of resisting the pretensions of the treaty of Whitehall, but they did not have sufficient force at their disposal to accomplish very much. In spite of their protests, paper blockades were still resorted to whenever it was considered an advantage to do so.

Treaty between  
Denmark and  
Sweden.

In 1725, Spain and Austria entered into a treaty providing that a port ought not to be considered as blockaded unless one could not enter without being exposed to the fire of the blocking artillery. But they also were

Treaty between  
Spain and  
Austria.

weak and their treaty did little more than to call attention to the unreasonableness of paper blockades.

**First armed  
neutrality.**

The first really effective protest against the system of paper or cabinet blockades was that of the armed neutrality in 1780. This coalition of powers laid down the principle that a port should not be denominated as a blockaded port, unless there are blockading vessels stationed there and sufficiently near to make it evidently dangerous for vessels to enter. Their declaration was backed up by sufficient force to make their protest felt. The same was true for a time of the second armed neutrality, 1800.

**Return to  
fictitious block-  
ades during  
Napoleonic  
wars.**

But these protests were effective merely so long as respect for them was compelled by force. That adherence to the principles set forth by them, in so far as there was adherence, rested upon force rather than upon a change of heart is shown by the fact that during the Napoleonic wars a system of paper blockades was entered upon which made all previous attempts seem amateurish in the extreme. By the Orders in Council and the Berlin and Milan decrees blockades were established by pens rather than by ships. There was little, if any, attempt to make the extent of the blockade proportionate to the naval force upon which it rested.

**Effect upon  
neutrals, par-  
ticularly the  
United States.**

The fact that this was a hardship upon neutrals was now disregarded, because nearly all of Europe was at war, and hence belligerent, not neutral, rights were uppermost. As commerce with England and with the Continent was made unlawful by decree, there was little commerce left for the United States. If its merchant ships cleared for English ports they were subject to capture by French cruisers; if for the ports of the Continent, by English cruisers. Between these two fires it suffered to such an extent that in desperation the ruin-

ous embargo of 1807 was resorted to. But an embargo by one country was from the beginning doomed to failure. To have produced an impression at that time a strong coalition of powerful neutrals was necessary. As, therefore, the United States was about the only strong neutral power, her attempt to force the belligerents to terms was an almost hopeless one.

When, however, the Napoleonic wars were over, and peace gave the nations time to reflect, they began to provide by treaty against such a contingency in the future.

The growing conviction that the main business of a nation was peace, not war, and that neutral rights must be something more than a fiction, very materially aided this movement. So that by the middle of the century, whose first two decades saw neutral rights ruthlessly trampled under foot, the principle that war should interfere as little as possible with the rights and interests of neutral nations had secured a sufficient following to sweep from its path all pretensions to legality of paper blockades. Even England, which had doggedly persisted in her adherence to the efficiency of decrees for the purpose of rendering neutral trade illegal, receded before the rising tide and consented to the elimination of paper blockades.

Though the principle that a "blockade in order to be binding must be effective" was not enunciated for the first time in treaty of Paris, 1856, adherence to it was then given by a sufficient number of powers to make it a recognized principle of international law. From that time on no nation has been rash enough to claim that a paper or cabinet blockade has the sanction of international law. We are therefore brought to a consideration of effective blockades.

Recurrence to  
treaties provid-  
ing for effective  
blockade.

The Declaration  
of Paris.

## SECTION II. EFFECTIVE BLOCKADES.

What constitutes an effective blockade.

By an effective blockade is meant that the blockaded ports or coasts shall be guarded by a sufficient force to make it really dangerous for ships to enter or leave the blockaded places. This condition may be brought about either by ships or shore batteries, e. g., a belligerent may institute an effective blockade of the enemy ports along a river either by stationing a ship or by securing possession of a fort at its mouth. Numerous attempts have been made by treaties to define with great particularity the force necessary to make a blockade effective. Some of these treaties provide that a blockade is not effective unless ships by entering and leaving must come within range of the guns of one of the blockading ships, others provide that it is not effective unless the ships in entering and leaving must come within range of the guns of two of the blockading ships.

But none of these arbitrary rules can be said to have acquired the force of law. It is left for the prize court to determine under all the circumstances whether or not the blockading force is sufficient to make it dangerous for ships to enter and leave. The fact that some ships get in or out without being captured is not sufficient proof that the blockade is not effective. There are ports with which it would be practically impossible to cut off all commercial intercourse by sea. While steam and electricity have in some ways made it easier to maintain an effective blockade, they have in many ways contributed to make it harder.

Classification of blockades.

Effective blockades may be divided into: Military, commercial, and pacific. The latter has already been considered in a previous chapter. The difference between



a military or strategic and a commercial blockade is that the former is applied only to places against which military operations are being conducted with a view to reducing them. While the latter is carried on against places for the purpose of intercepting their trade and thus weakening them when there is no immediate intention to take possession of them.

Concerning the latter, Mr. Cass, our Secretary of State, said in 1859: "The blockade of a coast or of commercial positions along it, without any regard to ulterior military operations, and with the real design of carrying on war against trade, and from its very nature against the trade of peaceful and friendly powers, instead of a war against armed men, is a proceeding which it is difficult to reconcile with reason or with the opinions of modern times. To watch every creek and river and harbor upon an ocean frontier, in order to seize and confiscate every vessel with its cargo, attempting to enter or go out, without any direct effect upon the true objects of war, is a mode of conducting hostilities which would find few advocates if now first presented for consideration. Unfortunately, however, the right to do this has been long recognized by the law of nations." (Mr. Cass to Mr. Mason, June 27, 1859). View of Secretary Cass.

- That a blockade, whether military or commercial, may be lawful, it must be instituted by the proper authorities, proper notice of it must be given, and it must be maintained by a sufficient force to make it effective. General requirements.

The question of what authority in the state may institute a blockade is primarily one of constitutional law. In the United States, the President, by virtue of his position as commander-in-chief of the army and navy, has the power to institute a blockade. If this means Authority to institute a blockade.

should be resorted to by an inferior officer, as it sometimes is, captures made under it would not be valid unless made so by the ratification of his act by the proper authority. Being properly an executive act and being also of the highest importance, inasmuch as it affects the rights of other states, it is usually entrusted to the chief executive.

**Opposing  
schools as to  
notice.**

As to the notice that is necessary there is the widest difference of opinion. In fact, the opposing schools are diametrically opposed to each other. The British and American view being that notice by proclamation conveyed to the governments of neutral states is sufficient as soon as such notice has had a reasonable length of time in which to be conveyed to their vessels. And that in any case actual notice is sufficient. The other view, which may be termed the continental or French view, is that the neutral vessel must receive notice direct from the war-ships of the blockading squadron. This notice is endorsed upon its papers and it is turned back. If it makes a subsequent attempt to enter the blockaded port, it may be captured and condemned as lawful prize.

**The relative  
reasonableness  
of the two views.**

As between these two views, the former seems to be the more reasonable. Notice through its own government should certainly be as reliable as notice from any other source. And if it has actual notice, it is hard to see why anything further should be expected. If a vessel may sail for a port which it knows is blockaded, in the hope that it may elude the blockading squadron, by slipping in under cover of fog or darkness, and, if unsuccessful in this, require that notice be then given it, the door to fraud is opened wide. If a blockade is to be considered legal at all, it should not be subjected to conditions and hedged about in such a way as to make of

it a farce. As was said in the case of *The Francisca*: "If a blockade *de facto* be good in law without notification, and a willful violation of a legal blockade be punished by confiscation, propositions which are free from doubt, the mode in which knowledge has been acquired by the offender, if it be clearly proved, cannot be of importance." (X Moore, p. 46.) A century ago, when a voyage consumed weeks where it now consumes days, there was far more reason for expecting that a blockade would be raised during the continuance of a voyage than there is at present. Hence there was greater room for innocent intent upon the part of one sailing for a blockaded port than there is to-day. But, then as now, it would seem more reasonable to presume that a blockade, once established, would continue during the voyage than to presume that the existing conditions will have changed. In discussing this rule, the United States Supreme Court has said that "It was established, with some hesitation, when sailing vessels were the only vehicles of ocean commerce; but now when steam and electricity have made all nations neighbors, and blockade-running from neutral ports seems to have been organized as a business, and almost raised into a profession, it is clearly seen to be indispensable to the efficient exercise of belligerent rights." (*The Circassion*, 2 Wallace 151.)

A blockade of enemy ports cannot be enforced so as to shut off commerce from neutral territory. Therefore, if one of the banks or the upper course of a river is neutral territory, such ports cannot be blockaded in order to enforce a blockade of the ports in enemy territory. The neutral must be allowed free access to his ports. His

Blockade must  
not isolate  
neutral terri-  
tory.

commerce must not be interdicted by a belligerent because a part of the river washes enemy territory.

Illustrations  
of rule.

Illustrations of this rule are to be found in the case of the blockade of the coast and rivers of Holland. It was held that vessels bound for Antwerp were not to be interfered with by this blockade (*The Frau Ilsabe*, 4 Robinson 52); and during the blockade of the ports of the Southern Confederacy, vessels were accorded free ingress and egress from Matamoras, which is on the southern side of the Rio Grande. (*The Peterhoff*, 5 Wallace 54. *The Dashing Wave*, Ibid. 170). The difficulty in such situations is to prevent the fraudulent clearance for neutral ports and then discharging the cargo at enemy ports. The difficulty is, therefore, not in the principle, which is very clear, but in the application of it. So many disputes arose during the blockade of the Texan ports on the Rio Grande, that the Supreme Court of the United States laid down the rule that when vessels were found upon the Texan side of the thread of the stream this would raise a sufficient presumption of their guilt to warrant their capture and in case they produced sufficient evidence to rebut this presumption, they would still not be entitled to damages for their detention. In the case of *The Dashing Wave*, 5 Wallace 177, the Court said: "We think it was the plain duty of a neutral claiming to be engaged in trade with Matamoras, under circumstances which warranted close observation by the blockading squadron, to keep his vessel, while discharging or receiving cargo, so clearly on the neutral side of the boundary-line as to repel, so far as position could repel, all imputation of intent to break the blockade. We cannot doubt that under the circumstances described, capturing and sending in for adjudication was fully warranted." This principle was reiterated in the

case of *The Science* and of *The Volant*, 5 Wallace, 178 and 180.

As to what constitutes a breach of blockade, there are two views, each of which is supported by high authority. According to the British and American view, the sailing for a port with knowledge that it is blockaded and with the intention to enter it constitutes a breach of the blockade and subjects the offender to capture, provided nothing intervenes that will relieve it of its guilt. The coming out of a port known to be blockaded, unless such egress is permitted by the rules of the blockade, is also a breach. The blockade is violated by the belligerents if they grant licenses to trade to their own or enemy subjects, provided such trade is not open to neutrals. In the case of *The Franciska* (Spinks, Prize Cases, p. 135) it was decided that "a belligerent may not concede to another belligerent or take for himself, the right of carrying on commercial intercourse prohibited to neutral nations. The foundation of this principle is clear and rooted in justice; for interference with neutral commerce at all is only justified by the right which war confers of molesting the enemy." According to the French or continental rule, there is no breach of blockade until the neutral vessel has been warned of the existence of the blockade by the blockading squadron, and afterward attempts to enter or come out in disregard of this warning. According to both these views it is customary to allow neutral vessels a certain length of time in which to finish loading and leave. Fifteen days is the usual time, but as it requires much longer to load in some ports than others, this time is extended, if the conditions in the particular port seem to make an extension advisable.

What constitutes a breach of blockade.

If a vessel sails for a port which it knows to be block-

Intent to inquire  
at an interme-  
diate port.

aded but with a bona fide intention of stopping at an intermediate neutral port for the purpose of making inquiry as to the continuance of the blockade and to desist from attempting to enter, if said blockade still continues, such act is not a breach of blockade.

Case of *The*  
*Circassian*.

In the case of *The Circassian* (2 Wallace 135) the vessel was condemned because the court was convinced that it had not even a colorable intention of not attempting to break the blockade, no matter what information it received at the neutral port. In its opinion the Court says: "We agree that if the ship had been going to Havana with an honest intent to ascertain whether the blockade at New Orleans yet remained in force, and with no design to proceed further if such should prove to be the case, neither ship nor cargo would be subject to lawful seizure. But it is manifest that such was not the intent. The existence of the blockade was known at the inception of the voyage and its discontinuance was not expected. The vessel was chartered and her cargo shipped for the purpose of forcing the blockade. The destination to Havana was merely colorable. It proves nothing beyond a mere purpose to touch at that port, perhaps and probably, with the expectation of getting information which would facilitate the success of the unlawful undertaking." In the light of this opinion it is not a little strange that as careful a writer as Hall should, in referring to the capture of this ship, have said that "during the American Civil War the courts of the United States strained and denaturalized the principles of English blockade law to cover doctrines of unfortunate violence." (Hall, *International Law*, p. 735). The decision instead of violating English law or practice, accords with it entirely.

When a blockade is applied to certain kinds of trade

as, for instance, trade from which a neutral is shut out during peace, it becomes important to determine what constitutes a continuous voyage. While it was customary for states to monopolize the trade of their colonies this was a very practical question. During her war with England in 1783, France opened her colonial trade to the world. England claimed that as other countries did not enjoy the right to carry goods from French colonies to France in time of peace, they did not have the right in time of war and that vessels caught in this trade would be captured. American vessels conceived of an ingenious way of avoiding this penalty. They had the right to carry goods from the French colonies to the United States and had also the right to carry goods from the United States to France. They therefore loaded at the French West Indies, sailed to the United States where they unloaded and straight way reloaded for France. The English courts decided that this was not two voyages but one continuous voyage, and that therefore the goods could be seized and confiscated, the same as though carried direct from the ports of the French Colonies to France. This construction seems to be a practical and reasonable one. It has since been adopted in principle by the Supreme Court of the United States.

In the case of the *Bermuda* (3 Wallace 514) it was held that "it makes no difference whether the destination to the rebel port was ulterior or direct; nor could the question of destination be affected by transshipment at Nassau, if transshipment was intended, for that could not break the continuity of the transportation of the cargo. A transportation from one point to another remains continuous, so long as intent remains unchanged, no matter what stoppage or transshipments intervene."

From the principle that a blockade in order to be bind-

**Temporary  
cessation of  
blockade.**

ing must be effective, it follows that if from any cause the blockading force is no longer present the blockade is for the time non-existent. If this is caused by the force of the enemy, a renewal of the blockade must be accompanied by notice to neutrals in the same manner as when originally instituted. If upon the other hand the cessation is due to stress of weather and is of but short duration, no such notice is necessary. Notice of the abandonment of a blockade should be given to neutrals, as the legal presumption is that a blockade when once lawfully established continues until notice of its relinquishment is given, this throws the burden of proof upon the neutral vessel to show that the blockade was, as a matter of fact, at the time of her capture, non-existent.

**Penalty for  
breach of  
blockade.**

The penalty for an unsuccessful attempt at breach of blockade is confiscation of ship and cargo, provided both belong to the same owner. If they belong to different owners and the owner of the goods has no knowledge of the guilty intent of the ship, the ship is condemned and the goods restored. No penalty is inflicted upon the master or crew of a blockade runner. They are guilty of no crime, the ship is the guilty thing.

#### PRIZE CASES.

(2 Black, 635.)

#### THE RIGHT TO INSTITUTE A BLOCKADE.

Mr. Justice Grier delivered the opinion of the court.

There are certain propositions of law which must necessarily affect the ultimate decision of these cases, and many others, which it will be proper to discuss and decide before we notice the special facts peculiar to each.

They are, *First*. Had the president the right to insti-



tute a blockade of ports in possession of persons in armed rebellion against the government, on the principles of international law, as known and acknowledged among civilized States?

*Second.* Was the property of persons domiciled or residing within those States a proper subject of capture on the sea as "enemies'" property?

I. Neutrals have a right to challenge the existence of a blockade *de facto*, and also the authority of the party exercising the right to institute it. They have a right to enter the ports of a friendly nation for the purposes of trade and commerce, but are bound to recognize the rights of a belligerent engaged in actual war, to use this mode of coercion, for the purpose of subduing the enemy.

That a blockade *de facto* actually existed, and was formally declared and notified by the president on the 27th and 30th of April, 1861, is an admitted fact in these cases.

That the president, as the executive chief of the government and commander-in-chief of the army and navy, was the proper person to make such notification, has not been, and cannot be disputed.

The right of prize and capture has its origin in the "*jus belli*," and is governed and adjudged under the law of nations. To make legitimate the capture of a neutral vessel or property on the high seas, a war must exist *de facto*, and the neutral must have a knowledge or notice of the intention of one of the parties belligerent to use this mode of coercion against a port, city, or territory, in possession of the other.

Let us inquire whether, at the time this blockade was instituted, a state of war existed which would justify a resort to these means of subduing the hostile force.

War has been well defined to be, "That state in which a nation prosecutes its right by force."

The parties belligerent in a public war are independent nations. But it is not necessary to constitute war that both parties should be acknowledged as independent nations or sovereign states. A war may exist where one of the belligerents claims sovereign rights as against the other.

Insurrection against the government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the government. A civil war is never solemnly declared; it becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war. They claim to be in arms to establish their liberty and independence, in order to become a sovereign state, while the sovereign party treats them as insurgents and rebels who owe allegiance, and who should be punished with death for their treason.

The laws of war, as established among nations, have their foundation in reason, and all tend to mitigate the cruelty and misery produced by the scourge of war. Hence the parties to a civil war usually concede to each other belligerent rights. They exchange prisoners, and adopt the other courtesies and rules common to public or national wars.

"A civil war," says Vattel, "breaks the bands of society and government, or at least suspends their force and

effect; it produces in the nation two independent parties, who consider each other as enemies, and acknowledge no common judge. Those two parties, therefore, must necessarily be considered as constituting, at least for a time, two separate bodies, two distinct societies. Having no common superior to judge between them, they stand in precisely the same predicament as two nations who engage in a contest and have recourse to arms.

"This being the case, it is very evident that the common laws of war—those maxims of humanity, moderation and honor—ought to be observed by both parties in every civil war. Should the sovereign conceive he has a right to hang up his prisoners as rebels, the opposite party will make reprisals, etc., etc.; the war will become cruel, horrible, and every day more destructive to the nation."

As a civil war is never publicly proclaimed, *eo nomine*, against insurgents, its actual existence is a fact in our domestic history which the court is bound to notice and to know.

The true test of its existence, as found in the writings of the sages of the common law, may be thus summarily stated: "When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts of justice cannot be kept open, civil war exists, and hostilities may be prosecuted on the same footing as if those opposing the government were foreign enemies invading the land."

By the constitution, Congress alone has the power to declare a national or foreign war. It cannot declare war against a state, or any number of states, by virtue of any clause in the constitution. The constitution confers on the president the whole executive power. He is bound to take care that the laws are faithfully exe-

cuted. He is commander-in-chief of the army and navy of the United States, and of the militia of the several states when called into the actual service of the United States. He has no power to initiate or declare a war against a foreign nation or domestic state. By the acts of Congress of February 28th, 1795, and 3rd of March, 1807, he is authorized to call out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a state or of the United States.

If a war be made by invasion by a foreign nation, the president is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or states organized in rebellion, it is none the less a war, although the declaration of it be "unilateral." Lord Stovell (1 Dodson, 247) observes, "It is not the less a war on that account, for war may exist without a declaration on either side. It is so laid down by the best writers on the law of nations. A declaration of war by one country only, is not a mere challenge to be accepted or refused at pleasure by the other."

The battles of Pala Alto and Reseca de la Palma had been fought before the passage of the act of Congress of May 13th, 1846, which recognized "a state of war as existing by the act of the republic of Mexico." This act not only provided for the future prosecution of the war, but was itself a vindication and ratification of the act of the president in accepting the challenge without a previous formal declaration of war by Congress.

This greatest of civil wars was not gradually devel-

oped by popular commotion, tumultuous assemblies, or local unorganized insurrections. However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of war. The president was bound to meet it in the shape it presented itself, without waiting for Congress to baptise it with a name; and no name given to it by him or them could change the fact.

It is not the less a civil war, with belligerent parties in hostile array, because it may be called an "insurrection" by one side, and the insurgents be considered as rebels or traitors. It is not necessary that the independence of the revolted province or state be acknowledged in order to constitute it a party belligerent in war according to the law of nations. Foreign nations acknowledge it as war by a declaration of neutrality. The condition of neutrality cannot exist unless there be two belligerent parties. In the case of the *Santisima Trinidad* (7 Wheaton, 337) this court says: "The government of the United States has recognized the existence of a civil war between Spain and her colonies, and has avowed her determination to remain neutral between the parties. Each party is therefore deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war." (See also 3 Binn., 252.)

As soon as the news of the attack on Fort Sumter, and the organization of a government by the seceding states, assuming to act as belligerents, could become known in Europe, to-wit, on the 13th of May, 1861, the queen of England issued her proclamation of neutrality, "recognizing hostilities as existing between the government of the United States of America and certain states styling themselves the Confederate States of

America." This was immediately followed by similar declarations of silent acquiescence by other nations.

After such an official recognition by the sovereign, a citizen of a foreign state is estopped to deny the existence of a war with all its consequences as regards neutrals. They cannot ask a court to affect a technical ignorance of the existence of a war, which all the world acknowledges to be the greatest civil war known in the history of the human race, and thus cripple the arm of the government and paralyze its power by subtle definitions and ingenious sophisms.

The law of nations is also called the law of nature; it is founded on the common consent as well as the common sense of the world. It contains no such anomalous doctrine as that which this Court are now for the first time desired to pronounce, to-wit: That insurgents who have risen in rebellion against their sovereign, expelled her courts, established a revolutionary government, organized armies, and commenced hostilities, are not enemies because they are traitors; and that a war levied on the government by traitors, in order to dismember and destroy it, is not a war because it is an "insurrection."

Whether the president in fulfilling his duties, as commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war with such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the government to which this power was intrusted. "He must determine what degree of force the crisis demands." The proclamation of blockade is itself official and conclusive evidence to the Court that a state of

war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case.

The correspondence of Lord Lyons with the secretary of state admits the fact and concludes the question.

If it were necessary to the technical existence of a war, that it should have a legislative sanction, we find it in almost every act passed at the extraordinary session of the legislature of 1861, which was wholly employed in enacting laws to enable the government to prosecute the war with vigor and efficiency. And finally, in 1861, we find Congress "*ex majore cautela*" and in anticipation of such astute objections, passing an act "approving, legalizing, and making valid all the acts, proclamations, and orders of the president, etc.," as if they had been issued and been done under the previous express authority and direction of the Congress of the United States.

Without admitting that such an act was necessary under the circumstances, it is plain that if the president had in any manner assumed powers which it was necessary should have the authority or sanction of Congress, that on the well known principle of law, "*Omnis ratihabitio retrotrahitur et mandato equiparatur*," this ratification has operated to perfectly cure the defect. In the case of *Brown v. United States* (8 Cr. 131, 132, 133), Mr. Justice Story treats of this subject, and cites numerous authorities to which we may refer to prove this position, and concludes, "I am perfectly satisfied that no subject can commence hostilities or capture property of an enemy, when the sovereign has prohibited it. But suppose he did, I would ask if the sovereign may not ratify his proceedings, and thus by a retroactive operation give validity to them?"

Although Mr. Justice Story dissented from the majority of the Court on the whole case, the doctrine stated by him on this point is correct and fully substantiated by authority.

The objection made to this act of ratification, that it is *ex post facto*, and therefore unconstitutional and void, might possibly have some weight on the trial of an indictment in a criminal court. But precedents from that source cannot be received as authoritative in a tribunal administering public and international law.

On this first question, therefore, we are of the opinion that the president had a right, *jure belli*, to institute a blockade of ports in possession of the states in rebellion, which neutrals are bound to regard.

#### THE NEPTUNUS.

(2 Robinson's Admiralty Reports 92.)

#### IS NOTICE OF BLOCKADE NECESSARY.

Judgment.

Sir Wm. Scott.—This is a case of a ship and cargo seized in the act of entering the port of *Havre* in pursuance of the original intention under which the voyage began. The notification of the blockade of that port was made on the 23d *February*, 1798, and this transaction happened in *November* in that year; the effect of notification to any foreign government would clearly be to include all the individuals of that nation; it would be the most nugatory thing in the world, if individuals were allowed to plead their ignorance of it; it is the duty of foreign governments to communicate the information to their subjects, whose interests they are bound to protect. I shall hold therefore that a neutral master



can never be heard to aver against a notification of blockade, that he is ignorant of it. If he is really ignorant of it, it may be a subject of representation to his own government and may raise a claim of compensation from them, but it can be no plea in the court of a belligerent. In the case of a blockade *de facto* only, it may be otherwise, but this is the case of a blockade by notification; another distinction between a notified blockade and a blockade existing *de facto* only, is that in the former, the act of sailing to a blockaded place is sufficient to constitute the offense. It is to be presumed that the notification will be formally revoked, and that due notice will be given of it; till that is done, the port is to be considered as closed up, and from the moment of quitting port to sail on such a destination, the offense of violating the blockade is complete, and the property engaged in it subject to confiscation: it may be different in a blockade existing *de facto* only, there no presumption arises as to the continuance, and the ignorance of the party may be admitted as an excuse, for sailing on a doubtful and provisional destination. But this is a case of a vessel from *Dantzick* after the notification, and the master cannot be heard to aver his ignorance of it. He sails: — till the moment of meeting Admiral Duncan's fleet, I should have no hesitation in saying, that if he had been taken, he would have been taken *in delicto*, and have subjected his vessel to confiscation; but he meets Admiral Duncan's fleet, and is examined, and liberated by the Captain of an *English* frigate belonging to that fleet, who told him that he might proceed on his destination, and who, on being asked, Whether *Havre* was under a blockade? said "It was not blockaded," and wished him a good voyage. The question is, in what light he is to be considered after receiving this information? That it was *bona fide*

given cannot be doubted, as they would otherwise have seized the vessel: the fleet must have been ignorant of the fact; and I have to lament that they were so. When a blockade is laid on, it ought by some kind of communication to be made known not only to foreign governments, but to the king's subjects, and particularly to the king's cruizers; not only to those stationed at the blockaded port, but to others, and especially considerable fleets, that are stationed *in itinere*, to such a port from the different trading countries that may be supposed to have an intercourse with it. Perhaps it would have been safer in the *English* captain to have answered, that he could not say anything of the situation of *Havre*; but the fact is (and it has not been contradicted) that the British officer told the master "that *Havre* was not blockaded." Under these circumstances, I think, that after this information he is not taken *in delicto*. I do not mean to say that the fleet could give the man any authority to go to a blockaded port; it is not set up as an authority, but as intelligence affording a reasonable ground of belief; as it could not be supposed that such a fleet as that was, would be ignorant of the fact.

From that time I consider that a state of innocence commences; the man was not only in ignorance, but had received positive information that *Havre* was not blockaded. Under these circumstances, I think it would be a little too hard to press the former offense against him; it would be to press a pretty strong principle rather too strongly; I think I cannot look retrospectively to the state in which he stood before the meeting with the *British* fleet, and therefore I shall direct this vessel and *cargo* to be restored.

## THE OLINDE RODRIGUES.

(174 U. S., 510.)

## WHAT CONSTITUTES AN EFFECTIVE BLOCKADE?

Mr. Chief Justice Fuller delivered the opinion of the court.

We are unable to concur with the learned District Judge in the conclusion that the blockade of the port of San Juan at the time this steamship was captured was not an effective blockade.

To be binding, the blockade must be known, and the blockading force must be present; but is there any rule of law determining that the presence of a particular force is essential in order to render a blockade effective? We do not think so, but on the contrary, that the test is whether the blockade is practically effective, and that that is a question, though a mixed one, more of fact than of law.

The fourth maxim of the Declaration of Paris (April 16, 1856) was: "Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy." Manifestly this broad definition was not intended to be literally applied. The object was to correct the abuse, in the early part of the century, of paper blockades, where extensive coasts were put under blockade by proclamation, without the presence of any force, or an inadequate force; and the question of what might be sufficient force was necessarily left to be determined according to the particular circumstances.

The quotations from the parliamentary debates of May, 1861, given by Mr. Dana in note 233 to the eighth edition of Wheaton on International Law, afford inter-

esting illustrations of what was considered the measure of effectiveness; and an extract is also there given from a note of the Department of Foreign Affairs of France of September, 1861, in which that is defined: "Forces sufficient to prevent the ports being approached without exposure to a certain danger."

In *The Mercurius*, I. C. Rob. 80, 84, Sir William Scott stated: "It is said, this passage to the Zuyder Zee was not in a state of blockade, but the ship was seized immediately on entering it; and I know not what else is necessary to constitute a blockade. The powers who formed the armed neutrality in the last war, understood blockade in this sense; and Russia, who was the principal party in that confederacy, described a place to be in a state of blockade, when it is dangerous to attempt to enter into it."

And in the *Frederick Molke*, I. C. Rob. 86, the same great jurist said: "For that a legal blockade did exist, results necessarily from these facts, as nothing farther is necessary to constitute blockade, than that there should be a force stationed to prevent communication, and a due notice, or prohibition given to the party."

Such is the settled doctrine of the English and American courts and publicists, and it is embodied in the second of the instructions issued by the Secretary of the Navy, June 20, 1898, General Order No. 492: "A blockade to be effective and binding must be maintained by a force sufficient to render ingress to or egress from the port dangerous."

Clearly, however, it is not practicable to define what degree of danger shall constitute a test of the efficiency and validity of a blockade. It is enough if the danger is real and apparent.

In *The Franciska*, 2 Spinks, 128, Dr. Lushington, in

passing on the question whether the blockade imposed on the port of Riga was an effective blockade, said: "What, then, is an efficient blockade, and how has it been defined, if, indeed, the term 'definition' can be applied to such a subject? The one definition mentioned is, that egress or entrance shall be attended with evident danger; another, that of Chancellor Kent (*I Kent's Co.*, 146), is, that it shall be apparently dangerous. All these definitions are and must be, from the nature of blockades, loose and uncertain; the maintenance of a blockade must always be a question of degree—of the degree of danger attending ships going into or leaving a blockaded port. Nothing is further from my intention, nor, indeed, more opposed to my notions of the law of nations, than any relaxation of the rule that a blockade must be efficiently maintained; but it is perfectly obvious that no force can bar the entrance to absolute certainty; that vessels may get in and get out during the night, or fogs or violent winds, or occasional absence; that it is most difficult to judge from numbers alone."

"It is impossible," says Mr. Hall (Sec. 260), "to fix with any accuracy the amount of danger in entry which is necessary to preserve the validity of the blockade. It is for the prize courts of the belligerents to decide whether in a given instance a vessel captured for its breach had reason to suppose it to be non-existent; or for the neutral government to examine, on the particular facts, whether it is proper to withhold or to withdraw recognition."

In *The Hoffnung*, C. Rob. 112, 117, Sir William Scott said: "When a squadron is driven off by accidents of weather, which must have entered into the contemplation of the belligerent imposing the blockade, there is

no reason to suppose that such a circumstance would create a change of system, since it could not be expected that any blockade would continue many months, without being liable to such interruptions. But when a squadron is driven off by a superior force, a new course of events arise, which may tend to a very different disposition of the blockading force, and which introduces a very different train of presumptions, in favor of the ordinary freedom of commercial speculations. In such a case the neutral merchant is not bound to foresee or to conjecture that the blockade will be resumed." And undoubtedly a blockade may be so inadequate, or the negligence of the belligerent in maintaining it may be of such a character, as to excuse neutral vessels from the penalties of its violation. Thus in the case of an alleged breach of the blockade of the island of Martinique, which had been carried on by a number of vessels on the different stations, so communicating with each other as to be able to intercept all vessels attempting to enter the ports of the island, it was held that their withdrawal was a neglect which "necessarily led neutral vessels to believe these ports might be entered without incurring any risk." *The Nancy*, 1 Acton, 57, 59. But it cannot be that a vessel actually captured in attempting to enter a blockaded port, after warning entered on her log by a cruiser off that port only a few days before, could dispute the efficiency of the force to which she was subjected.

As we hold that an effective blockade is a blockade so effective as to make it dangerous in fact for vessels to attempt to enter the blockaded port, it follows that the question of effectiveness is not controlled by the number of the blockading force. In other words, the position cannot be maintained that one modern cruiser

though sufficient in fact is not sufficient as matter of law.

Even as long ago as 1809, in *The Nancy*, 1 Acton, 63, where the station of the vessel was sometimes off the port of Trinity and, at others, off another port more than seven miles distant, it was ruled that: "Under particular circumstances a single vessel may be adequate to maintain the blockade of one port and co-operate with the other vessels at the same time in the blockade of another neighboring port"; although there Sir William Grant relied on the opinion of the commander on that station that the force was completely adequate to the service required to be performed.

The ruling of Dr. Lushington in *The Franciska*, above cited, was to that effect, and the text books refer to other instances.

The learned District Judge, in his opinion, refers to the treaty between France and Denmark of 1742, which provided that the entrance to a blockaded port should be closed by at least two vessels or a battery on shore; to the treaty of 1760, between Holland and the Two Sicilies prescribing that at least six ships of war be ranged at a distance slightly greater than gunshot from the entrance; and to the treaty between Prussia and Denmark, 1818, which stipulated that two vessels should be stationed before every blockaded port; but we do not think these particular agreements of special importance here, and indeed, Ortolan, by whom they are cited, says that such stipulations cannot create a positive rule in all cases even between the parties, "since the number of vessels depends evidently on the nature of the place blockaded," 2 Ortolan (4th ed.), 330, and note 2.

Nor do we regard Sir William Scott's judgment in *The Arthur* (1814), 1 Dodson, 423, as of weight in favor of claimants. In effect the ruling sustained the validity of the maintenance of a blockade by a single ship, and the case was thus stated: "This is a claim made by one of His Majesty's ships to share as joint captor in a prize taken in the River Ems by another ship belonging to His Majesty, for a breach of the blockade imposed by the order in council of the 28th April, 1809. This order, was, among others, issued by way of retaliation for the measures which had been previously adopted by the French Government against the commerce of this country. The blockade imposed by it is applicable to a very great extent of coast, and was never intended to be maintained according to the regular mode of enforcing blockades, by stationing a number of ships, and forming as it were an arch of circumvallation around the mouth of the prohibited port. There, if the arch fails in any one point, the blockade itself fails altogether; but this species of blockade, which has arisen out of the violent and unjust conduct of the enemy, was maintained by a ship stationed anywhere in the neighborhood of the coast, or, as in this case, in the river itself, observing and preventing every vessel that might endeavor to effect a passage up or down the river."

Blockades are maritime blockades, or blockades by sea and land; and they may be either military or commercial, or may partake of the nature of both. The question of effectiveness must depend on the circumstances. We agree that the effect of a single capture is not decisive of the effectiveness of a blockade, but the case made on this record does not rest on that ground.



We are of the opinion that if a single modern cruiser blockading a port renders it in fact dangerous for other craft to enter the port, that is sufficient, since thereby the blockade is made practically effective.

What were the facts as to the effectiveness of the blockade in the case before us?

In the proclamation of June 27, 1898, occurs this paragraph:

"The United States of America has instituted and will maintain an effective blockade of all the ports on the south coast of Cuba, from Cape Frances to Cape Cruz, inclusive, and also of the port of San Juan, in the island of Porto Rico." (Proclamation No. 11, Stat. 34.) The blockade thus announced was not of the coast of Porto Rico, but of the port of San Juan, a town of less than 25,000 inhabitants, on the northern coast of Porto Rico, with a single entrance. From June 27 to July 14, 1898, the Yosemite, a merchant ship converted into an auxiliary cruiser, blockaded the port. Her maximum speed was fifteen and one-half knots; and her armament ten 5-inch rapid firing guns, six 6-pounders, two 1-pounders, with greatest range of three and one-half miles. While the Yosemite was blockading the port she ran the armed transport Antonio Lopez aground six miles from San Juan; gave a number of neutral vessels official notice of the blockade; warned off many from the port; and on the 5th of July, 1898, wrote in the log of the Olinde Rodrigues, off San Juan, the official warning of the blockade of San Juan. On July 14 and thereafter the port was blockaded by the armored cruiser New Orleans, whose maximum speed was twenty-two knots, and her armament six 6-inch breech-loading rifles, four 4.7-inch breech-loading rifles, ten 6-pounders, four 1.5-inch guns, corresponding to 3-

pounders; four 3-pounders in the tops; four 37-millimetre automatic guns, corresponding to 1-pounders. The range of her guns was five and one-half sea miles or six and a quarter statute miles. If stationary, she could command a circle of thirteen miles in diameter; if moving at maximum speed, she could cover in five minutes any point on a circle of seventeen miles diameter; and in ten minutes any point on a circle of nineteen miles diameter; her electric search-lights could sweep the sea by night for ten miles distance; her motive power made her independent of winds and currents; in these respects and in her armament and increased range of guns she so far surpassed in effectiveness the old-time war ships that it would be inadmissible to hold that even if a century ago more than one ship was believed to be required for an effective blockade, therefore this cruiser was not sufficient to blockade this port.

Assuming that the Olinde Rodrigues attempted to enter San Juan, July 17, there can be no question that it was dangerous for her to do so, as the result itself demonstrated. She had had actual warning twelve days before; no reason existed for the supposition that the blockade had been pretermitted or relaxed; her commander had no right to experiment as to the practical effectiveness of the blockade, if he did so, he took the risk; he was believed to be making the attempt, and was immediately captured. In these circumstances the vessel cannot be permitted to plead that the blockade was not legally effective.

After the argument on the motion to discharge the vessel, application was made by counsel for the claimant to the District Judge, by letter, that the Navy Department be requested to furnish the Court with all the letters or dispatches of the commanders of vessels block-

ading the port of San Juan in respect to the sufficiency of the force. And a motion was made in the court "for an order authorizing the introduction into the record of the dispatches of Captain Sigsbee and Commander Davis," dated June 27, 1898, and July 26, 1898, and published by the Navy Department in the "Appendix to the Report of the Chief of the Bureau of Navigation, 1898," pp. 224, 225, 642.

To this the United States objected on the grounds that isolated statements transmitting official information to superior officers, and consisting largely of opinion and hearsay, were not competent evidence; that the claimants had been afforded the opportunity to offer additional proof, and had not availed themselves thereof; that if the Court desired to have these papers before it, then the government should be permitted to define their meaning by counter proofs; and certain explanatory affidavits were, at the same time, tendered for consideration, if the motion were granted.

We need not specifically rule on the motion, or as to the admissibility of either the dispatches or affidavits, as we are satisfied that the dispatches have no legitimate tendency to establish that the blockade was not effective so far as the exclusion of trade from this port of the belligerent, whether in neutral or enemy's trading ships, was concerned. This country has always recognized the essential difference between a military and a commercial blockade. The one deals with the exclusion of trade, and the other involves the consideration of armed conflict with the belligerent. The necessity of a greater blockading force in the latter class than in the former is obvious. The difference is in kind and degree.

Our government was originally of opinion that com-

mercial blockades in respect of neutral powers ought to be done away with; but that view was not accepted, and during the period of the Civil War the largest commercial blockade ever known was established. Dana's Wheat, *Int. Law* (8th ed.), p. 671, note 232; Whart. *Int. Dig.*, Sec. 361.

The letters of Captain Sigsbee, of the *St. Paul*, and of Commander Davis, of the *Dixie*, must be read in the light of this recognized distinction; and it is to be further remarked that after the letter of Captain Sigsbee of June 27 the *New Orleans* was sent by Admiral Sampson officially to blockade the port of San Juan, thereby enormously increasing its efficiency.

And the letter of the Commander of the *Dixie*, of July 26, 1898, appears to us to have been written wholly from the standpoint of the efficiency of the blockade as a military blockade. He says: "Captain Folger kept me through the night on the 24th, as he had information which led him to believe that an attack would be made on his ship during the night. There are in San Juan, Porto Rico, the *Terror*, a torpedo gun-boat; the *Isabella II.*, a cruiser; a torpedo boat and a gunboat. There is also a German steamer, which is only waiting an opportunity to slip out." And further: "It is Captain Folger's opinion that the enemy will attempt to raise the blockade of San Juan, and it is my opinion that he should be re-enforced there with the least possible delay."

In our judgment these naval officers did not doubt the effectiveness of the commercial blockade, and had simply in mind the desirability of rendering the blockade, as a military blockade, impregnable, by the possession of a force sufficient to successfully repel any hostile

attack of the enemy's fleet. The blockade was practically effective; and remained so; and was legal and binding, if not raised by an actual driving away of the blockading force by the enemy; until the happening of which result the neutral trader had no right to ask whether the blockade, as against the possible superiority of the enemy's fleet, was or was not effective in a military sense.

But was this ship attempting to enter the port of San Juan, on the morning of July 17, when she was captured? It is contended by counsel for the claimant that if the rulings of the District Court should be disapproved of, an opportunity should still be given it to put in further proofs in respect of the violation of the blockade, notwithstanding it had declined to do so under the order of that court. That order gave ninety days to the captors for further proofs, and to the claimant, thereafter, such time for testimony in reply as might seem proper. After the captors had put in their proofs, the claimant, without introducing anything further, moved for the discharge and restitution of the steamship on the ground of the ineffective character of the blockade, and because the evidence did not justify a decree of condemnation; but undertook to reserve the right to adduce further proof, in the event that its motion should be denied. The District Court commented with disfavor upon such an attempt, and we think the claimant could not as a matter of right demand that the cause be opened again. The settled practice of prize courts forbids the taking of further proofs under such circumstances; and in the view we take of the cause it would subserve no useful purpose to permit this to be done.

On the proofs before us in the case is this: The Olinde Rodrigues was a merchant vessel of 1675 tons, belonging to the Compagnie Générale Transatlantique, engaged in the West India trade and receiving a subsidy from the French government for carrying its mails on an itinerary prescribed by the postal authorities. Her regular course was from Havre to St. Thomas, San Juan, Puerto Plata and some other ports, returning by the same ports to Havre. She sailed from Havre June 16, and arrived at St. Thomas July 3, and at San Juan the morning of July 4. The proclamation of the blockade of San Juan was issued June 27, while she was on the sea. The United States cruiser Yosemite was on duty in those waters, blockading the port of San Juan, and when her commander sighted the Olinde Rodrigues coming in from the eastward toward the port he made chase, but before reaching her she had turned in and was under the protection of the shore batteries. He lay outside until the next morning—the morning of July 5—when he intercepted the steamship as she was coming out, and sent an officer aboard, who made this entry in her log: “Warned off San Juan July 5th, 1898, by U. S. S. Yosemite. Commander Emory. John Burns, Ensign U. S. Navy.” The master of the Olinde Rodrigues, whose testimony was taken *in preparatorio*, testified that when he entered San Juan, July 4th, he had no knowledge that the port was blockaded, and that he first heard of it from the Yosemite on July 5, when he was leaving San Juan. After the notification he continued his voyage on the specified itinerary, arriving at Gonaives, the last port outward, on July 12. On his return voyage he stopped at the same ports, taking on freight, passengers and mail for Havre. At Cape Haytien, on July 14, he received a telegram from the agent

of his company at San Juan, telling him to hasten his arrival there by one day in order to take on fifty first-class passengers, and he replied that the ship would not touch at San Juan, but would be at St. Thomas on the 17th. The purser testified that on receipt of the cable from the consignee at San Juan, he told the captain "that since we were advised of the blockade of Porto Rico by the war ship, it was absolutely necessary not to stop," and that "before me, the agent in Cape Haytien, sent a cablegram, saying 'Daim (the vessel) will not stop at San Juan, the blockade being notified.'"

The ship's master further testified that on the outward voyage at each port he had warned the agent of the company and the postal department that he would not touch at Porto Rico, that he would not take passengers for that port, and that the letters would be returned to St. Thomas, and that having received his clearance papers at Puerto Plata at half past five o'clock on the evening of July 15, he did not leave until six o'clock in the morning of July 16, as he did not wish to find himself at night along the coast of Porto Rico.

The ship was a large and valuable one, belonging to a great steamship company of world-wide reputation; she was on her return voyage laden with tobacco, sugar, and other products of that region; she had no cargo, passengers or mail for San Juan; she had arrived off that port in broad daylight, intentionally according to the captain; her regular itinerary on her return to France would have taken her from Port au Prince to San Juan, and from San Juan to St. Thomas, and thence to Havre, but as San Juan was blockaded and she had been warned off, and could not lawfully stop there, her route was from Port au Prince to St. Thomas, which led

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her directly by and not many miles from the port of San Juan.

The only possible motive which could be or is assigned for her to attempt to break the blockade is that the consignee at San Juan cabled the captain at Cape Haytien, "that he must stop at San Juan and take fifty first-class passengers." At this time the fleet of Admiral Cervera had been destroyed; Santiago had fallen; and the long reign of Spain in the Antilles was drawing to an end. Doubtless the transportation of fifty first-class passengers would prove remunerative, especially as some of them might be Spanish officials, and Spanish archives and records, and treasure, might accompany them if they escaped on the ship. It is forcibly argued that these are reasonable inferences, and afford a sufficient motive for the commission of the offense. But as, where the guilty intent is established, the lack of motive cannot in itself overthrow it, so the presence of motive is not in itself sufficient to supply the lack of evidence of intent. Now, in this case, the captain not only testified that he answered the cable to the effect that he should not stop at San Juan, but the purser explicitly stated that the agent at Cape Haytien sent the telegram for the captain, specifically notifying the agent at San Juan that the ship would not stop there, the blockade having been notified. It is true that the cablegram was not produced, but this was not to be expected in taking the depositions *in pre-paratorio*, and that of the agent at Cape Haytien. There is nothing in the evidence to the contrary, and under the liberality of the rules of evidence in the administration of the civil law, we must take this as we find it, and, as it stands, the argument that a temptation was held out is answered by the evidence that it was resisted.

Such being the situation, and the evidence of the



ship's officers being explicit that the vessel was on her way to St. Thomas and had no intention of running into San Juan, the decree in her favor must be affirmed on the merits.

#### THE STERT.

(4 Robinson's Admiralty Reports, 53.)

#### INLAND NAVIGATION THROUGH NEUTRAL TERRITORY NOT AFFECTED BY BLOCKADE.

##### Judgment

Sir. W. Scott.—This is a question arising out of the blockade of Amsterdam, respecting goods put on board in a port of the Texel, for the very purpose of being sent to London, without any interruption of the voyage, but conveyed out of Holland to Embden, by the means of the canal navigation, as I understand it. The question is, whether this is to be considered as a breach of the blockade? A blockade may be of different descriptions. The blockade of Amsterdam which was imposed on the part of this country, was from the nature of our situation, a mere maritime blockade, effected by force operating only at sea. As far as that force could be applied, it was indubitably a good and legal blockade; but as to an interior navigation, how is it a blockade at all? Where is the blockading power? Let us suppose the case of the blockading of Havre—Can it be said, that, by the maritime blockade of the Seine, the interior access to Havre is blockaded, so that goods belonging to a neutral subject sent from Paris to Havre, could be held subject to confiscation by virtue of the blockade? It is argued, that if this course of trade is allowed, the object of the blockade, which is to distress the trade of Holland, will be defeated. If that is the consequence, all that can be said is, that it is an unavoidable conse-

quence. It must be imputed to the nature of the thing which will not admit of an effectual remedy of this species. This Court cannot, on that ground, take upon itself to say, that a legal blockade exists, where no actual blockade can be applied. In the very notion of a complete blockade it is included, that the besieging force can apply its power to every point of the blockaded state. If it cannot, it is no blockade of that quarter where its power cannot be brought to bear; and where such a partial blockade is undertaken, it must be presumed that this is no more than what was foreseen by the blockading state, which nevertheless thought proper to impose it to the extent to which it was practicable. The commerce though partially open, is still subjected to a pressure of difficulties and inconvenience: To cut off the power of immediate export and import from the ports of Holland, is of itself no insignificant operation, although it may not be possible to exclude them from the benefit of an inland communication. If the blockade be rendered imperfect by this construction, it must be ascribed to the physical impossibility of the measure, by which the extent of its legal pretensions is unavoidably limited.

In laying down this rule as applicable to the present case, I proceed upon the supposition, that this was a real inland navigation and not a navigation over the Watt, the character of which might be subject to a different signification; conceiving this to be a cargo which had gone to Embden on neutral account, by an internal canal navigation, where no blockade existed, I shall hold it free of all consequences of blockade; allowing the captors their necessary expenses, upon the particular facts of the case.

## THE FRAU ILSABE.

(4 Robinson's Admiralty Reports, 52.)

## EXTENT OF BLOCKADE.

This was a case of a cargo taken on a voyage from Hamburgh to Antwerp, September, 1799, and proceeded against, for a breach of the blockade of Holland.

Judgment,

Sir W. Scott.—Antwerp is certainly no part of Holland; and with respect to the Scheldt, it is not within the Dutch territory, but rather a continuous river, dividing Holland from the adjacent country. And though by treaties with the Dutch, made in favour of the Dutch, we have considered the Scheldt as shut up, and appropriated to the use of Holland, yet those treaties being extinguished by our present war with Holland, it is too much to say, that it is at this time to be legally regarded as standing upon that footing, particularly for the purpose of a blockade, which is to act upon the interests of other states, who might be no parties to those treaties, even when they did exist. If the government had notified in express terms that the blockade was to include the Scheldt, which they might certainly have done (for it was just as lawful to blockade the ports of Flanders as those of Holland), I should, of course, have enforced the rule so prescribed; but no signification being made, I do not think myself authorized to hold the Scheldt to be now necessarily included in the blockade of Holland.

## THE PETERHOFF.

(5 WALLACE, 38.)

## THE EXTENT OF A BLOCKADE.

The Chief Justice delivered the opinion of the Court.

This case is of much interest. It was very thoroughly argued, and has been attentively considered.

The *Peterhoff* was captured near the island of St. Thomas, in the West Indies, on the 25th of February, 1863, by the United States steamship *Vanderbilt*. She was fully documented as a British merchant steamer, bound from London to Matamoras, in Mexico, but was seized, without question of her neutral nationality, upon suspicion that her real destination was to the blockaded coast of the States in rebellion, and that her cargo consisted, in part, of contraband goods.

The evidence of the record satisfies us that the voyage of the *Peterhoff* was not simulated. She was in the proper course of a voyage from London to Matamoras. Her manifest, shipping list, clearance, and other custom house papers, all show an intended voyage from one port to the other. And the preparatory testimony fully corroborates the documentary evidence.

Nor have we been able to find anything in the record which fairly warrants a belief that the cargo had any other direct destination. All the bills of lading show shipments to be delivered off the mouth of the Rio Grande, into lighters, for Matamoras. And this was the usual course of trade. Matamoras lies on the Rio Grande, forty miles from its mouth; and the *Peterhoff's* draught of water would not allow her to enter the river. She could complete her voyage, therefore, in no other way than by the delivery of her cargo into lighters for conveyance to the port of destination.

It is true that, by these lighters, some of the cargo might be conveyed directly to the blockaded coast; but there is no evidence which warrants us in saying that such conveyance was intended by the master or the shippers.

We dismiss, therefore, from consideration, the claim, suggested rather than urged in behalf of the government, that the ship and cargo, both or either, were destined for the blockaded coast.

But it was maintained in argument (1) that trade with Matamoras, at the time of the capture, was made unlawful by the blockade of the mouth of the Rio Grande; and if not, then (2) that the ulterior destination of the cargo was Texas and the other states in rebellion, and that the ulterior destination was in breach of the blockade.

We agree that, so far as liability for infringement of blockade is concerned, ship and cargo must share the same fate. The owners of the former were owners also of part of the latter; the adventure was common; the destination of the cargo, ulterior as well as direct, was known to the owners of the ship, and the voyage was undertaken to promote the objects of the shippers. There is nothing in this case as in that of the *Springbok* to distinguish between the liability of the ship and that of the merchandise it conveyed.

We proceed to inquire, therefore, whether the mouth of the Rio Grande was, in fact, included in the blockade of the rebel coast?

It must be premised that no paper or constructive blockade is allowed by international law. When such blockades have been attempted by other nations, the United States have ever protested against them and denied their validity. Their illegality is now confessed on all hands.

It was solemnly proclaimed in the Declaration of Paris of 1856, to which most of the civilized nations of the world have since adhered; and this principle is no-

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where more fully recognized than in our own country, though not a party to that declaration.

What then was the blockade of the rebel states? The president's proclamation of the 19th April, 1862, declared the intention of the government "to set on foot a blockade of the ports" of those states, "by posting a competent force so as to prevent the entrance or exit of vessels." And, in explanation of this proclamation, foreign governments were informed "that it was intended to blockade the whole coast from the Chesapeake Bay to the Rio Grande."

In determining the question whether this blockade was intended to include the mouth of the Rio Grande, the treaty with Mexico, in relation to that river, must be considered. It was stipulated in the 5th article that the boundary line between the United States and Mexico should commence in the Gulf, three leagues from land opposite the mouth of the Rio Grande, and run northward with the middle of the river. And in the 7th article it was further stipulated that the navigation of the river should be free and common to the citizens of both countries without interruption by either without the consent of the other, even for the purpose of improving the navigation.

The mouth of the Rio Grande was, therefore, for half its width, within Mexican territory, and, for the purposes of navigation, was, altogether, as much Mexican as American. It was clear, therefore, that nothing short of an express declaration by the executive would warrant us in ascribing to the government an intention to blockade such a river in time of peace between the two Republics.

It is supposed that such a declaration is contained in the president's proclamation of February 18th, 1864,



which recites as matter of fact that the port of Brownsville had been blockaded, and declares the relaxation of the blockade. The argument is that Brownsville is situated on the Texas bank of the Rio Grande, opposite Matamoras; and that the recital in the proclamation that Brownsville had been blockaded must therefore be regarded as equivalent to an assertion that the mouth of the river was included in the blockade of the coast. It would be difficult to avoid this inference if Brownsville could only be blockaded by the blockade of the river. But that town may be blockaded also by the blockade of the harbor of Brazos Santiago and the Boca Chica, which were, without question, included in the blockade of the coast. Indeed, until with a year prior to the proclamation, the port of entry for the district was not Brownsville, but Point Isabel on that harbor; and, in the usual course, merchandise intended for Brownsville was entered at Point Isabel, and taken by a short land conveyance to its destination.

We know of no judicial precedent for extending a blockade by construction. But there are precedents of great authority the other way.

It is impossible to say, therefore, in the absence of an express declaration to that effect, that it was the intention of the government to blockade the mouth of the Rio Grande. And we are the less inclined to say it, because we are not aware of any instance in which a belligerent has attempted to blockade the mouth of the river or harbor, occupied on one side by neutrals, or in which such a blockade has been recognized as valid by any court administering the law of nations.

The only case which lends even apparent countenance to such a doctrine, is that of *The Maria*, adjudged by Sir W. Scott in 1805. The cargo in litigation had

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been conveyed from Bremen, through the Weser to Varel, near the mouth of the Jade, and there transshipped for America. The mouth of the Weser was then blockaded, and Sir W. Scott held, that the commerce of Bremen, though neutral, could not be carried on through the Weser. This, he admitted, was a great inconvenience to the neutral city, which had no other outlet to the sea; but it was an incident of her situation and of war. It happened in that case that a relaxation of the blockade in favor of Bremen warranted restitution. Otherwise there can be no doubt that the cargo would have been reluctantly condemned.

But it is an error to suppose this case an authority for an American blockade of the Rio Grande, affecting the commerce of Matamoras. Counsel were mistaken in the supposition that only one bank of the Weser was occupied by the French, and that Bremen was on the other. Both banks were in fact so held, and the blockade was warranted by the hostile possession of both. The case would be in point had both banks of the Rio Grande been in rebel occupation.

Still less applicable to the present litigation is the case of *The Zelden Rust*, cited at bar. That was not a case of violation of blockade at all. The *Zelden Rust*, a neutral vessel, entered the Bay or River De Betancos, on one side of which was Ferrol, and on the other Corunna. Counsel argued on the supposition that Ferrol was a belligerent and Corunna a neutral port, whereas both were belligerent; and the cargo was condemned on the ground of actual or probable destination to Ferrol, which was a port of naval equipment; though nominally destined to Corunna, also a port of naval equipment, though not to the same extent as Ferrol. There was no blockade of the river or of either town.

It is unnecessary to examine other cases referred to by counsel. It is sufficient to say that none of them support the doctrine that a belligerent can blockade the mouth of a river, occupied on one bank by neutrals with complete rights of navigation.

We have no hesitation, therefore, in holding that the mouth of the Rio Grande was not included in the blockade of the ports of the rebel states, and that neutral commerce with Matamoras, except in contraband, was entirely free.

If we had any doubt upon the subject, it would be removed by the fact that it was the known and constant practice of the government to grant clearances for Matamoras from New York, on condition of giving bond that no supplies should be furnished to the rebels—a condition necessarily municipal in its nature and inapplicable to any clearance for a foreign port. These clearances are incompatible with the existence of the supposed blockade.

We come next to the question whether an ulterior destination to the rebel region, which we now assume as proved, affected the cargo of the *Peterhoff* with liability to condemnation. We mean the neutral cargo; reserving for the present the question of contraband, and questions arising upon citizenship or nationality of shippers.

It is an undoubted general principle, recognized by this Court in the case of *The Bermuda*, and in several other cases, that an ulterior destination to a blockaded port will infect the primary voyage to a neutral port with liability for intended violation of blockade.

The question now is whether the same consequence will attend an ulterior destination to a belligerent

country by inland conveyance. And upon this question the authorities seem quite clear.

During the blockade of Holland in 1799, goods belonging to Prussian subjects were shipped from Edam, near Amsterdam, by inland navigation to Emden, in Hanover, for transshipment to London. Prussia and Hanover were neutral. The goods were captured on the voyage from Emden, and the cause came before the British Court of Admiralty in 1801. It was held that the blockade did not affect the trade of Holland carried on with neutrals by means of inland navigation. "It was," said Sir William Scott, "a mere maritime blockade effected by force operating only at sea." He admitted that such would defeat, partially at least, the object of the blockade, namely, to cripple the trade of Holland, but observed: "If that is the consequence, it must be imputed to the nature of the thing which will not admit a remedy of this species. The court cannot on that ground take upon itself to say that a legal blockade exists where no actual blockade can be applied. \* \* \* It must be, nevertheless, thought proper to impose it to the extent to which it was practicable."

The same principle governed the decision of the case of *The Ocean*, made also in 1801. At the time of her voyage Amsterdam was blockaded, but the blockade had not been extended to the other ports of Holland. Her cargo consisted partly or wholly of goods ordered by American merchants from Amsterdam, and sent thence by inland conveyance to Rotterdam, and there shipped to America. It was held that the conveyance from Amsterdam to Rotterdam, being inland, was not affected by the blockade, and the goods, which had been captured, were restored.

These were cases of trade from a blockaded to a neu-

tral country, by means of inland navigation, to a neutral port or a port not blockaded. The same principle was applied to trade from a neutral to a blockaded country by inland conveyance from the neutral port of primary destination to the blockaded port of ulterior destination in the case of the *Jonge Pieter*, adjudged in 1801. Goods belonging to neutrals going from London to Emden, with ulterior destination by land or an interior canal navigation to Amsterdam, were held not liable to seizure for violation of the blockade of that port. The particular goods in that instance were condemned upon evidence that they did not in fact belong to neutrals, but to British merchants, engaged in unlawful trade with the enemy; but the principle just stated was explicitly affirmed.

These cases fully recognize the lawfulness of neutral trade to or from a blockaded country by inland navigation or transportation. They assert principles without disregard of which it is impossible to hold that inland trade from Matamoras, in Mexico, to Brownsville or Galveston, in Texas, or from Brownsville or Galveston to Matamoras, was affected by the blockade of the Texas coast.

And the general doctrines of international law lead irresistibly to the same conclusion. We know of but two exceptions to the rule of free trade by neutrals with belligerents: the first is that there must be no violation of blockade or siege; and the second, that there must be no conveyance of contraband to either belligerent. And the question we are now considering is, "Was the cargo of the *Peterhoff* within the first of these exceptions?" We have seen that Matamoras was not and could not be blockaded; and it is manifest that there was not and could not be any blockade of the Texas bank of the Rio

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Grande as against the trade of Matamoras. No blockading vessel was in the river; nor could any such vessel ascend the river, unless supported by a competent military force on land.

The doctrine of The Bermuda case, supported by counsel to have an important application to that before us, has, in reality, no application at all. There is an obvious and broad line of distinction between the cases. The Bermuda and her cargo were condemned because engaged in a voyage ostensibly for a neutral, but in reality either directly or by substitution of another vessel, for a blockaded port. The Peterhoff was destined for a neutral port with no ulterior destination for the ship, or none by sea for the cargo to any blockaded place. In the case of the Bermuda, its cargo destined primarily for Nassau could not reach its ulterior destination without violating the blockade of the rebel ports; in the case before us the cargo, destined primarily for Matamoras, could reach an ulterior destination in Texas without violating any blockade at all.

We must say, therefore, that trade, between London and Matamoras, even with intent to supply, from Matamoras, goods to Texas, violated no blockade, and cannot be declared unlawful.

Trade with a neutral port in immediate proximity to the territory of one belligerent, is certainly very inconvenient to the other. Such trade, with unrestricted inland commerce between such a port and the enemy's territory, impairs undoubtedly and very seriously the value of a blockade of the enemy's coast. But in cases such as that now in judgment, we administer the public law of nations, and are not at liberty to inquire what is for the particular advantage or disadvantage of our own or another country. We must follow the lights of

reason and the lessons of the masters of international jurisprudence.

The remedy for inconveniences of the sort just mentioned is with the political department of the government. In the particular instance before us, the Texas bank of the Rio Grande might have been occupied by the national forces; or with the consent of Mexico, military possession might have been taken of Matamoras and the Mexican bank below. In either course Texan trade might have been entirely cut off. Sufficient reasons, doubtless, prevailed against the adoption of either. The inconvenience of either, at the time, was doubtless supposed to outweigh any advantage that might be expected from the interruption of the trade.

What has been said sufficiently indicates our judgment that the ship and cargo are free from liability for violation of blockade.

We come then to the other questions.

Thus far we have not thought it necessary to discuss the question of actual destination beyond Matamoras. Nor need we now say more upon the general question than that we think it is a fair conclusion from the whole evidence that the cargo was to be disposed of in Mexico or Texas as might be found most convenient and profitable to the owners and consignees, who were either at Matamoras or on board the ship. Destination in this case becomes specially important only in connection with the question of contraband.

#### THE NEWFOUNDLAND.

(176 U. S., 97.)

#### BREACH OF BLOCKADE.

Mr. Justice Kenna delivered the opinion of the court.

"We will now look into the character and conduct of the Newfoundland to see whether her presence off Havana is consistent with innocent intent.

"She is a small steamship, lately employed in the sealing business. She sailed from Halifax, July 9, loaded with a cargo of provisions, under command of Captain Malcolm, who was employed for that voyage. She had two clearances, one for Kingston and one for Vera Cruz. Commander Mackenzie testifies that it is not the practice of any American custom house to give two clearances. Captain Malcolm says that this is not unusual in Halifax, and that he has generally had separate clearances for separate ports, sometimes five or six, whenever he had cargo for each. We have no statute prescribing any regulation on this subject, and whenever a ship has separate cargo for separate ports I can see no reason why she should not have a clearance for each, and I am informed that it is the custom at this port to give such separate clearances. While I cannot hold that separate clearances for Kingston and vera Cruz were in themselves suspicious, it is a cause of grave and just suspicion that her real and primary destination was to neither of those ports, as subsequent events proved. Captain Malcolm, in his testimony *in preparatorio*, said that his verbal instructions were to sail for Caibairien or Sagua la Grande, and if those ports were blockaded to go to Kingston and cable for orders. For reasons, into which it is not the province of this Court to inquire, neither Sagua nor Caibairien were included among the ports blockaded under the proclamation of the President, and he had the right to go to either.

Whether in so doing without proper clearances he would have incurred penalties under the municipal regulations of Great Britain or of Spain is not within the



scope of this inquiry, certain it is that he would have committed no offense cognizable here.

"Taking his course to the southward, he next appears off Neuvinas, where he is boarded by Lieutenant Titus, of the U. S. S. Badger, and is informed by him that the whole coast of Cuba is blockaded. The case is not presented in an aspect which requires any determination of the question whether that sort of a blockade was effective or legal, as he did not go to either Sagua or Caibairien for the purpose of testing its validity, which he might well have done. According to his testimony in *preparatorio*, and it is repeated in this hearing, he abandoned all thought of entering either of those ports upon hearing that they were blockaded. His course, then, should have been around the eastern end of the island of Cuba to Kingston, by way of Cape Maysi, for the course around the western end, by Cape Antonio, was nearly a thousand miles further. In these days of sharp competition intelligent men do not take such long detours in the prosecution of legitimate business. The explanation given is that he wanted to satisfy his charterers by showing them that he had passed by the port to which he was directed to go, and, further, that he apprehended that he would subject himself to suspicion by changing his course at that time. The answer to this is obvious. His charterers did not instruct him to go by the ports of Sagua and Caibairien, but to go to them, and if he did not intend to do that his proceeding in that direction was such a futile, time-consuming and coal-consuming venture that it staggers credulity to accept it as the true reason; nor does the other reason seem much more satisfactory. There was nothing unlawful in his setting out for Sagua or any other open port in Cuba, and if, after information of the blockade,

it became necessary to change his course in order to go by the shortest route to Kingston, his contingent destination, there would have been no risk in disclosing the truth. In this, as in most of the affairs of life, the straightforward course would have been the wisest course. That it was not taken suggests the conclusion that neither Sagua nor Caibairien was the real destination. It appears from the testimony that neither at the time of capture nor afterwards was anything ever heard about Sagua or Caibairien until it came out in the examination of Captain Malcolm before the prize commissioners. None of the other officers of the ship appear to have known about it. The mate seems to have thought that they were going to Vera Cruz. In the engineer's log there appears every day from July 9th to July 18th, inclusive, a line at the top of the page containing the words, 'from Halifax to Vera Cruz and —— Cuba.' The word 'Kingston' is written over and partially obliterates the word 'Cuba,' evidently intended to be filled in. 'Havana' would about fill it. The engineer appeared to be the most intelligent man on the ship after the master. From the entry on his log it is plain that he knew that the ship's destination was Cuba, and there would seem to be no good reason why the name of the port should have been left blank if it was Sagua or any other open port. In the absence of any testimony confirming the master's statement that his instructions were to go to Sagua or Caibairien, and there being nothing in his conduct showing that that was his destination, and his appearance before Havana is therefore not satisfactorily explained.

"Lieutenant Culver, of the Mayflower, who boarded her, says that when he asked Captain Malcolm where he was bound he was very vague in his replies, sometimes

saying Kingston and sometimes saying Vera Cruz, and when asked whether he was shaping his course by way of Cape San Antonio he replied that he hadn't made up his mind. In the same conversation he said he had been making eight knots an hour from the time he was boarded by the Tecumseh at the time of overhauling. To Commander Mackenzie, on the Mayflower, he said he was making for Vera Cruz, if he had coal enough, and then to Kingston. If he did not have enough coal, he was going to Kingston in order to take on coal. To Lieutenant Pratt, the prize master on the voyage up to Charleston, he said that he was bound for Vera Cruz.

"Captain Malcolm says, in his testimony, that his instructions were to go to Kingston if he found the ports of Sagua and Caibairien blockaded, and from there he was to cable for instructions, and that Kingston was his destination; that he had plenty of coal to get to Kingston, but not enough to go to Vera Cruz and then Kingston.

"It must be conceded that there is no proof of any attempt to enter the port of Havana—that is to say, no witness has testified to seeing her heading that way. It must also be admitted that the testimony as to loitering falls very far short of the proof offered in the *Neutralitet*, the *Apollo*, the *Charlotte Christine*, the *Gute Erwartung*, the cases relied on by the government."

The application of a more stringent rule to the Newfoundland than was applied in those cases was justified by the Court on the ground that steam vessels have greater power of eluding blockades than sailing vessels possess.

The conclusion of the Court was that the evidence established that the ship was loitering about the coast

seeking an opportunity to violate the blockade. Conceding, *arguendo*, that this was enough for her condemnation, we think the fact is very disputable. It is based upon the ship's nearness to the coast, the slowness of her movements deduced from her position when the Tecumseh boarded her and when the Mayflower captured her, and the taking of a longer route to Kingston than might have been selected.

These circumstances may be explained consistently with innocence. Against them the fact remains that she made no attempt to enter any Cuban port. She sailed by Caibairien. She sailed by Sagua, although a railroad connected it with Havana, and made it inviting to contraband enterprise. And she had sailed beyond Havana when she was captured. But it is argued she must have loitered, and with guilty intention because she ran only twelve miles in three hours, when she ought to have run twenty-four miles.

In this conclusion there are disputes of fact as well as disputes of inference. It depends upon the time it was and where she was when the Tecumseh boarded her—the time it was and where she was when the Mayflower seized her; and granting a decision of these as contended for by the government, there are the elements of a varying course in the night and the retarding influence of the current to account for the time.

The fact of going around Cuba to Kingston instead of turning back when she was boarded by the Tecumseh, is from our present view not completely accounted for. But our situation, it must be remembered, was not Captain Malcolm's situation. It was his view, he testified, of his duty to his employers. It was his way to avoid exciting the suspicion of the officers of the Tecumseh; and in another place, without peril or responsibility for

that or some other decision, we are not prepared to say that it is necessarily proof of guilt. After experience it is often easy to see that something else should have been done than that which was done, but judging Captain Malcolm in his situation, was there not presented to him a fair conflict of reasons? It is very certain, if doubt came to him what to do, he would avoid the hazard of the seizure of his ship at the comparatively small sacrifice of the coal and time which would be consumed by going to Kingston the longer way.

It is further urged that when the Newfoundland was seen and pursued by the Mayflower she had not her usual lights displayed. This, the District Court said, the testimony left in reasonable doubt. "While it is probable," it was said, "that the masthead light, if burning and not screened, would have been visible to Ensign Pratt at the time he described the small light, he does not say with certainty that it would have been, there being but a narrow limit of possibility." The limit was as narrow to all other officers of the pursuing vessel and the possibilities it afforded must be considered as at least balanced by the positive testimony of all on board of the Newfoundland, including the sailor who lit them at the usual hour, and the fact that they were all burning when she was overhauled.

But it may be said that the ship has too many suspicious circumstances to account for, and that we overlook the probative strength arising from their number and their concurrence; that if each one standing alone can be explained, all together unerringly point to the guilt of the ship. We appreciate the force of the argument but cannot carry it so far. And yet we have no desire to impair the effectiveness of blockades by declaring a more indulgent rule than that of prior cases nor

permit experiment with opportunities to break into blockaded ports. But there should be some tangible proof of such intention—a more definite demonstration than this record exhibits. As we have already seen, the learned trial judge was constrained to say “that the testimony as to loitering falls very short of the proof offered in the *Neutralitet*, the *Apollo*, the *Charlotte Christine*, the *Gute Erwartung*, the cases relied on by the government. Their application, however, to the case at bar, whose facts “fall far short” of their facts, is insisted on because of the difference between the power of steam vessels and the power of sailing vessels. Undoubtedly there is a difference, but if steam has increased the power of blockade runners, it has increased in greater degree when conjoined with the range of modern ordnance, the power of blockade defenders. We recently had occasion to consider their power and decide that a single modern cruiser might make a blockade effective. *The Olinde Rodriguez*, 174 U. S., 510.

The question in this case, then, is as to the adequacy of the proof, and we do not think it attains that degree which affords a reasonable assurance of the justice of the sentence of forfeiture. It raises doubts and suspicions—makes probable cause for the capture of the ship and justification of her captors, but not forfeiture. *The Olinde Rodriguez*, *supra*.

It follows, therefore, that the decree of the District Court must be reversed and the cause remanded, with directions to enter a decree restoring the vessel and cargo, or if they have been sold, the proceeds of the sale, but without damages or costs, and it is so ordered.

## CHAPTER IV.

### VISIT AND CAPTURE.

Just so long as contraband of war belonging to neutrals, if destined for an enemy port, may be captured, the right of visit and search under some form will very probably continue. There must be some way of ascertaining whether the ship is really neutral or not, and, if neutral, whether or not it has in its cargo contraband of war. The neutral flag might of course be taken as conclusive evidence of the character of the ship and also that the cargo contained no contraband of war, but the risk to belligerents, unless provision were made for careful inspection by agents of the belligerents or by the neutral governments, before their ships clear, would be so great that the rule is not likely to be adopted in the near future. Apart from treaty, the right does not exist in time of peace. Though several attempts have been made to assert the right when the nation asserting it was not at war, the practice is not sanctioned by international law. During the early part of the nineteenth century it was contended that the right existed in time of peace for the purpose of breaking up the slave trade. As the slave trade is not likely to be revived, this contention is of historical interest merely.

Though some have attempted to separate the right of visit from the right of search, these rights are, for practical purposes, really inseparable. Unless by agreement, there is no right upon the part of a belligerent to visit a ship, if there is not also the right to examine her papers in order to ascertain whether or not she is *bona fide* neutral, and, if these are suspicious, to search the cargo

Purpose and necessity of visit and search.

Right of visit and search inseparable.

for contraband goods and thus satisfy himself as to whether or not there is sufficient cause for sending her to a prize court.

Lord Stowell's  
view.

The right exists as against all merchant vessels of a neutral, but not as against its public vessels. In the language of Lord Stowell, "the right of visiting and searching merchant vessels on the high seas, whatever be the ships, whatever be the cargoes, and whatever be the destinations, is an incontestible right of the lawfully commissioned ships of a belligerent nation; because, till they are visited and searched it does not appear what the ships or cargoes or destinations are, and it is for the purpose of ascertaining these points that the necessity of this right of visitation and search exists. The right is so clear in principle that no man can deny it who admits the right of maritime capture; because if you are not at liberty to ascertain by sufficient inquiry whether there is property that can be legally captured, it is impossible to capture. Even under the rule that free ships make free goods, the exercise of this right must be admitted, for the purpose of ascertaining whether the ships are free or not." (The Maria, 1 Robinson 287).

By what ships  
the right may be  
exercised.

The right may be exercised upon the open sea or within the territorial waters of the belligerents. It is possessed only by the regularly commissioned ships of the belligerents. So that with those states that are signatories to the Declaration of Paris it could not be exercised by privateers. In the Russo-Japanese war, the question presented itself in a peculiar form. Some vessels of the Russian volunteer fleet came out of the Black Sea as merchant vessels, and no sooner were they out than they hoisted the war flag and began to search neutral merchant vessels in and near the Red Sea. Now, if these Russian ships were warships, they were there in



violation of law; and if they were not warships, they had no right to visit and search neutral merchant ships. They did not persist in their pretensions long enough to thoroughly test the question of their status and rights. The proceeding was, to say the least, a very irregular one, and it is doubtful if neutrals would have very long submitted to it.

The mode of exercising the right is for the belligerent warship to fire an affirming or semonce gun, which is a warning for the merchant vessel to "bring to." If for any reason the latter disregards this signal, a shot is fired across her bows, and if she still persists in flight, she may be crippled or even sunk. But she almost invariably brings to at the second, if not at the first, signal. A boat is then lowered from the belligerent vessel and an officer and a few men are sent to board the merchantman and make the necessary examinations; but, according to modern practice, the belligerent warship may reverse the process and require the master or other officer of the merchantman to bring the ship's papers to the warship for examination. According to the Institute of International Law, the belligerent has not this right. Upon the general subject of the formalities which should be observed, Lushington says in his Naval Prize Law: "If the state of the wind and the weather permit, the commander should communicate his intention to visit by hailing and then cause his ship to go ahead of the suspected vessel and drop a boat alongside of her. If the state of the wind or weather render such a course impracticable, the commander should require the vessel to bring to. For this purpose he should give warning by firing two blank guns, and then, if necessary, a shot across her bows; but before firing, the commander, if he has chased under false colors, or without showing

Mode of exercising the right.

his colors, should be careful to hoist his own flag and pendant." (Naval Prize Law, p. 5.) Apart from treaty, there are no formalities which may be considered indispensable (The Marianna Flora II, Wheaton 48), nor is there any universally recognized distance, although numerous attempts have been made to fix with great precision the distance.

**Documents  
subject to  
examination.**

The search usually consists of an examination of the ship's papers. From the following documents, if genuine, the necessary information can be secured. (1) The ship's register. This contains the name of the owner, also the name, size and other particulars necessary for purposes of identifying the ship and indicating her nationality; (2) The passport or clearance papers issued by the neutral state; (3) Invoices, which enumerate the articles of which the cargo is made up; (4) Duplicate bill of lading kept by the master, showing to what consignee the goods are to be delivered. In addition to these the log-book and muster-roll of the crew may be of use; as may also the charter party or contract under which the ship is making the voyage.

**Effect of irreg-  
ularities in  
ship's papers.**

If the above appear to be irregular, the cargo may be examined and members of the crew may be interrogated for the purpose of ascertaining the facts. If false papers are found, this is invariably sufficient to warrant the belligerent in sending the ship to a prize court for adjudication. The same is true when double papers are found; also when evidence of spoilation or attempt at spoilation of papers has been discovered. Of course, when the cargo is found to be made up in whole or in part of contraband, or there has been an attempt at resistance, the ship may be sent in for adjudication.

**Or presence of  
contraband  
goods.**

The use of convoy by neutral merchant ships has occasioned a great deal of dispute. The controversy upon

this point was begun in 1653 when the right to visit merchant vessels under convoy of a neutral warship was questioned by Sweden. In that year Queen Christina **Neutral convoy.** issued orders to her ships of war to be always ready to convoy Swedish merchant vessels desiring protection, and directed the convoying ships "in all possible ways to decline that they or any of those that belong to them be searched." The following year, the war between England and the United Provinces, which called forth these orders, came to an end by the Peace of Westminster, and the issue was not forced. Three years later the Dutch admiral, De Ruyter, prevented British warships from visiting merchant vessels which he was convoying from Cadiz to Flanders, but upon protest to his government by the British it was agreed that the papers of the convoyed ships should be exhibited by the commander of the convoying ship or ships and that any ship whose papers were suspicious might be taken into a beligerent port for adjudication. For a hundred years the question was not again raised. But in 1759 when England and France were at war it was again revived by the Dutch. It was not, however, until the American Revolution that the doctrine was vigorously pressed and with a strong backing. During that war the doctrine was again urged with a persistency characteristically Dutch, and again it was resisted with a pugnacity characteristically English.

The Armed Neutrality of 1780, the first Armed Neutrality, forced at least a partial recognition of the principle and this was emphasized by the second Armed Neutrality which "laid down as one of its principles that the declaration of the officer commanding a vessel in charge of merchantmen should be conclusive as to the innocence of the traffic in which they were engaged, and

**Doctrine set forth by the Armed Neutralities.**

that no search should be permitted." (Hall, *International Law*, p. 750.) The United States has concluded thirteen treaties embodying this principle, and it is adhered to by Austria, France, Germany, Holland, Italy, Norway, Russia and Sweden. Though it is still opposed by England, it may safely be said to be an established principle of international law.

**Rule as to  
merchantmen  
of other na-  
tionality than  
the conveying  
ship.**

Whether a warship of a neutral may convoy neutral merchantmen of other nationality than its own is open to grave doubt. Upon this question Hautefeuille says: "Convoy entails upon the government extending it a sort of responsibility. If evident frauds are committed under the shadow of this legal protection, the belligerent whose cruisers have not the right to verify nor even to suspect the declaration of the chief officer of the convoy, has the right to turn to the neutral sovereign and to ask reparation for the injury done and the punishment of those guilty. If one supposed that fraud is committed by foreign ships convoyed by a ship of war of a neutral but of another nation, what will be the sovereign's responsibility toward the belligerent"? The nation owning the warship, it seems, ought to bear all the responsibility, for it is its word which has deceived the belligerent; yet the guilty one is not under its jurisdiction; it cannot punish it. The sovereign of the convoyed ship which wrought the fraud has made no engagement with the belligerent. The responsibility becomes, then, illusory or falls upon the one who is not guilty. Ortolan claims that the exemption from visit does not extend to merchantmen convoyed by a neutral warship not of their own nationality. Calvo says that "the majority of the treaties which stipulate the right of neutrals to convoy ships are silent on this question, or at least leave us in doubt. Some treaties, however, have stipulated positively that

the convoying ship shall be of the same nation as the ships convoyed." (Le Droit International, Tome V., 236.)

The fact that the commander of the neutral warship has no jurisdiction over merchant vessels of other than his own nationality makes it so easy for him to be im- Same subject. posed upon that it is unlikely that merchant vessels under his convoy will be conceded legal exemption from visit and search. Apart from treaties, the extent of the right which is likely to be conceded to the convoying commander is to see that the belligerent who visits such merchant vessels under his convoy does not exceed his rights by use of fraud or force.

It is a pretty well recognized rule of law that a neutral merchant vessel which seeks the protection of an enemy convoy does not thereby become exempt from visit and search, but it is hardly safe to go so far as to claim that Enemy convoy. she thereby becomes good prize. In 1810, Denmark passed an ordinance declaring every ship incorporated in transit under an English convoy to be good prize. In replying to this on behalf of the United States Government, Wheaton took the ground that such was not the law of nations, and that Denmark could not by de- Dispute between Denmark and the United States. crete or otherwise change the law of nations with reference to third parties; that the ships seized were engaged in innocent traffic, and that they were entitled to be judged according to the law of nations.

After about twenty years' negotiations, Denmark agreed to pay a lump sum to the United States to be distributed to the owners of the captured vessels. The decision of the Supreme Court of the United States in the case of *The Nereide* (9 Cranch, 440) was in accord with Wheaton's view.

**American view as to enemy convoy.** Notwithstanding the fact that the English courts and publicists, and Story, Field and other American publicists, hold that the mere fact of joining a belligerent convoy of itself condemns the neutral merchantman to confiscation if caught, the doctrine is a harsh one and cannot be said to be fully established. The conduct of the merchant vessel is not necessarily inconsistent with an innocent intent. Her act is consistent with an intention to avoid attacks by privateers, which have no right of visit, or merely to protect herself by flight as soon as a belligerent war vessel belonging to the enemy of its convoying vessel appears. To seek protection from piratical attacks or by flight the neutral vessel has an entire right; and whether or not anything unlawful was intended is a proper question for a prize court. There does not seem to be a sufficiently firm foundation upon which to conclusively presume guilt. This is substantially the view taken by the Supreme Court of the United States and by most European courts and publicists.

**French view.** Ortolan says that 'the fact of sailing under enemy convoy can be considered irregular, but that if the neutral merchant vessel joins herself to one or more belligerent war ships in the open sea and sails with them without pretending to any protection from them, in the sole hope of being able to escape visit peacefully and by flight in case of a fight by the belligerents, that is on her part an innocent ruse which cannot be imputed to her as crime and cannot of itself entail confiscation.'

**Causes justifying capture.** The causes which are generally recognized as warranting capture are: piracy, the possession of false or double papers, intentional spoliation or concealment of papers, knowingly carrying despatches to the enemy, resistance to lawful visit, having contraband goods aboard des-

tined to a belligerent port, or attempting to run a lawful blockade.

At one time it was contended by many that engaging in the slave trade was so contrary to the law of nations as to warrant the capture and confiscation of the vessel so engaged. But this cannot be considered as a correct statement of the law. Unless the municipal law of the country to which the ship belonged made the trade unlawful and provided the penalty of confiscation, <sup>Is the slave trade piracy?</sup> ships engaged in the trade could not lawfully be captured and confiscated. Several attempts were made to have the slave trade considered as piracy under international law, but these were unsuccessful. In the case of *The Louis* (2 Dodson, 210), Sir William Scott in pronouncing the opinion of the court said: "I think it requires no labor of proof to show that such an occupation cannot be deemed a legal piracy. No lawyer, I presume, could be found hardy enough to maintain that an indictment for piracy could be supported by the mere evidence of trading in slaves."

In a case involving the same question, Justice Marshall said: "The legality of the capture of a vessel engaged in the slave trade depends upon the law of the country to which the vessel belongs. If that law gives its sanction to the trade, restitution will be decreed; if that law prohibits it, the vessel and cargo will be condemned as good prize." (*The Antelope*, 10 Wheaton, 241.)

The duty of a captor is to send the captured vessel to the nearest prize court with as little delay as possible, or, if she is not in condition to be taken to a port of <sup>Duty of the captor.</sup> his own country where a prize court exists, she should be taken to a neutral port if practicable. As to the port

to which the captured ship shall be sent, Lushington, in his Naval Prize Law, lays down the following rules: "(1) The port should be capable of giving safe harborage to the ship; (2) It should be large enough so that the cargo need not be removed; (3) It should offer easy communications with the prize court, and (4) It should be as near as possible to the place of capture." The captor is liable in damages for unlawful force used in making the capture or unnecessary detention after it has been made. Until the title to the property has been changed by an adjudication of a prize court the captor is simply a bailee of the goods, and as such can be held for demurrage or waste due to his fault, but not for loss resulting from the perils of the sea. He is likewise liable for unnecessary injuries inflicted by him upon the passengers or crew of the captured vessel.

**Destruction of prizes.**

The destruction of prizes, if the property of the enemy, is lawful, but if captured from neutrals is very rarely justifiable, as this would in many cases remove the very evidence necessary to show that the capture was unlawful. A very recent case upon this point is that of the *Knight Commander*, a British vessel, sunk by the Russians, although it is very doubtful if she could have been condemned as good prize if she had been taken to a prize court. If the condition of the vessel is such that she cannot be taken to any port, all persons should be removed from her and all papers and other evidence of the guilt or innocence of the ship should be taken to a prize court. Witnesses whose testimony is valuable may be detained until a hearing can be had.



## THE GROTIUS.

(9 Cranch, 368.)

## WHAT CONSTITUTES A CAPTURE.

Washington, J., delivered the opinion of the court, as follows:

This case comes before the court upon an order for further proof, made at the last session, in relation to the validity of the alleged capture of this vessel. The master, the mate, and two of the seamen of *The Grotius*, in answer to some of the standing interrogatories, swore that they did not consider the ship to have been seized as prize, and that the young man who was put on board by Odiorne, the captain of the privateer, was received and considered as a passenger, during the residue of the voyage. The deposition of Very, the alleged prize master, was taken and read in the court below, in which he swore that he was present at the capture; that Sheafe, the master of *The Grotius*, was ordered to go on board the privateer with his papers, and that he (Very) was directed by Captain Odiorne, in the presence of Sheafe, to go with the prize, as prize master, and to permit the captain of *The Grotius* to keep possession of the ship's papers and to navigate her into port. That he accordingly went on board as prize master, taking with him a copy of the privateer's commission, and also written instructions from Captain Odiorne for his own conduct.

The deposition of Very, though irregularly taken in that stage of the cause, was, nevertheless, calculated to weaken the preparatory evidence in relation to this contested fact, and to point out the propriety of a further investigation. The evidence of this witness lost much of its weight, from the circumstances that his letter of in-

structions was not annexed to his depositions, or made an exhibit in the cause. It was proper that this omission should be supplied by the captors, if it could be done, and that they should have an opportunity to fortify the evidence of Very, if in their power to do so. For these reasons, the order for further proof was extended, as well to the captors as to the claimants. Under this order the captors have exhibited an attested copy of the written instructions to Very, bearing date the 29th of July, 1813. They inform him that he is put on board *The Grotius*, and direct him to proceed in the ship, and, on his arrival, to report himself to the agent of the privateer, who would take such measures as he might deem necessary; that he is not to take charge of the vessel, but is to allow the captain to take her into any port in the United States he might see fit. The authenticity of this paper is ascertained by the affidavit of the prize agent of the privateer, in which he swears that the original was delivered to him by Very, on his arrival, as containing his orders, and that it has remained ever since in his possession. The deposition of Very has not been taken under the order for further proof, but the omission is accounted for by the prize agent, who, in his affidavit, swears that Very was captured on a subsequent voyage, and had not since returned to the United States. Under these circumstances, the court feels no difficulty in receiving his deposition originally taken in the court below. In addition to the letter of instructions to Very, the collector of the port of Portsmouth has furnished an extract from the journal of the privateer, kept on that cruise, which states "that on the 30th of July, 1813, *The Grotius* was boarded, and after an examination of her papers, a prize master was put on

board of her, and she was ordered to the first port in the United States."

This documentary evidence is further supported by the deposition of Mr. Wardwell, the surgeon of the privateer, who swears that Captain Odiorne informed the master of *The Grotius*, after he had come on board, that he should make out a copy of his commission, and should put a prize master on board, to whom he should give orders to suffer Captain Sheafe to conduct his ship into any port of the United States he should think fit; that he would be further instructed to report to the custom house, on his arrival, and to inform the agent of the privateer of his arrival. That a prize master, named Very, was accordingly placed on board, with instructions and a copy of the commission. This witness being examined, as touching his interest in this cause, swears that he has none, having, for a valuable consideration, assigned all his interest in the prize to the owners of the privateer. The only evidence given by the claimants, under the order for further proof, is the deposition of John DeForest, and the affidavit of Captain Sheafe, which corresponds with his answers to the standing interrogatories; and, in addition thereto, he contradicts the material parts of Wardwell's testimony. DeForest was a passenger on board of *The Grotius*, and he swears that Very exercised no authority whatsoever on board that ship, but was considered and treated as a passenger.

Upon this evidence and the answers to the standing interrogatories, the cause is now to be decided; and the only question is, whether *The Grotius* was in fact seized as prize of war. When the facts are ascertained, there can be very little doubt what constitutes in law a valid seizure as prize. It is clear that some act should be

done indicative of an intention to seize and to retain as prize; and it is always sufficient if such intention is fairly to be inferred from the conduct of the captor. Now, in this case, the evidence of Very and Wardwell, proving that Captain Sheafe was distinctly informed that his ship would be sent in as a prize, is corroborated by the written instructions to the former, which he delivered, on his arrival, to the prize agent, and by the journal of the privateer, both of which documents correspond with the evidence of those witnesses. The former of these documents, written at the time when Very was appointed the prize master, as he states, imports a clear declaration of the intention of Captain Odiorne, and having been deposited with the prize agent, immediately on the arrival of *The Grotius*, it cannot be presumed to have been fabricated to serve the purpose for which it is now used.

Although the instructions do not call Very prize master by name, yet they contain other equivalent expressions; for if he was put on board merely as a passenger, what had he to do with reporting the vessel, on her arrival, to the collector, and particularly to the prize master?

The evidence, then, on the part of the captor, would be quite sufficient to establish the fact of a valid capture, if it stood uncontradicted. The only positive evidence against it is the deposition of Sheafe, which is in direct opposition to that of Wardwell and Very. He swears that Odiorne represented himself, in the first instance, as the commander of a British privateer, and, as such, threatened to put a prize master on board, and send him into Halifax. That he afterwards avowed his real character, after which he never spoke of putting a prize mas-

ter on board, but merely requested him to receive Very as a passenger. He says that the first conversation, when Odiorne spoke of putting a prize master on board, took place in the cabin, when Wardwell was present; that the latter conversation was on deck, when he was not present.

Wardwell is equally positive. He swears that after Captain Odiorne had disclosed his real character, he told Sheafe that he should put a prize master on board, and send him into any port in the United States he might choose, adding that he might as well be prize to the privateer as be seized by the Government of the United States on his arrival; to which Captain Sheafe assented. He further swears that Captain Odiorne informed the captain of *The Grotius* that he should direct the prize master to report himself to the custom house, and to the prize agent. In point of credit these witnesses appear to be equal, neither of them having any personal interest in the dispute. But Wardwell is fully supported by Very, and their united testimony receives considerable aid from the instructions, and from the journal of the privateer. They are also supported, in some degree, by the answer of Chambers, one of the crew of *The Grotius*, to one of the standing interrogatories, in which he states that Very, the day after his coming on board of that ship, declared that he was put on board as prize master.

The evidence of the mate, of DeForest and of Prince is entitled to very little weight, because the two former did not go on board of the privateer, and the latter, although he did accompany Captain Sheafe to the privateer, does not pretend that he heard any conversation between him, and Captain Odiorne; and, being a common seaman, it

is unlikely that he should have been admitted into their company. The evidence of these persons, as to the unassuming conduct of Very whilst on board *The Grotius*, from which they inferred that he was there merely as a passenger, is entirely consistent with the arrangement proved to have been made on board of the privateer, that he was not to interfere in the navigation of the vessel.

Upon the whole, it is the opinion of the majority of the court, that the validity of the capture of *The Grotius*, as prize of war, is sufficiently established by the evidence, and the captain having acquiesced in the subsequent arrangement as to the mode of sending in the vessel, she ought to have been condemned to the use of the captors.

The decree of the Circuit Court, condemning the ship *Grotius*, etc., to the United States, is reversed; and the court, proceeding to give such decree as the said Circuit Court ought to have given, it is further decreed and ordered that the said ship be condemned as lawful prize to the captors.

#### THE ANTELOPE.

(10 Wheaton, 66.)

#### THE RIGHT TO CAPTURE SLAVERS.

Appeal from the Circuit Court of Georgia.

These cases were allegations filed by the vice-consuls of Spain and Portugal, claiming certain Africans as the property of subjects of their nation. The material facts were as follows: A privateer, called the *Colombia*, sailing under a Venezuelan commission, entered the port of Baltimore in the year 1819; clandestinely shipped a crew of thirty or forty men; proceeded to sea, and

hoisted the Artegan flag, assuming the name of the Arraganta, and prosecuted a voyage along the coast of Africa; her officers and the greater part of her crew being citizens of the United States. Off the coast of Africa she captured an American vessel, from Bristol, in Rhode Island, from which she took twenty-five Africans; she captured several Portuguese vessels, from which she also took Africans; she captured a Spanish vessel, called The Antelope, in which she also took a considerable number of Africans.

The two vessels then sailed in company to the coast of Brazil, where the Arraganta was wrecked, and her master, Metcalf, and a great part of his crew, made prisoners; the rest of the crew, with the armament of the Arraganta, were transferred to The Antelope, which, thus armed, assumed the name of The General Ramirez, under the command of John Smith, a citizen of the United States; and on board this vessel were all the Africans which had been captured by the privateer in the course of her voyage. This vessel, thus freighted, was found hovering near the coast of the United States, by the revenue cutter Dallas, under the command of Captain Jackson, and finally brought into the port of Savannah for adjudication. The Africans, at the time of her capture, amounted to upwards of two hundred and eighty. On their arrival the vessel and the Africans were libeled, and claimed by the Portuguese and Spanish vice-consuls reciprocally. They were also claimed by John Smith, as captured *jure belli*. They were claimed by the United States, as having been transported from foreign parts by American citizens, in contravention to the laws of the United States, and as entitled to their freedom by those laws and by the law of nations. Captain Jackson, the

master of the revenue cutter, filed an alternative claim for the bounty given by law, if the Africans should be adjudged to the United States; or to salvage, if the whole subject should be adjudged to the Portuguese and Spanish consuls.

The court dismissed the libel and claim of John Smith. They dismissed the claim of the United States, except as to that portion of the Africans which had been taken from the American vessel. The residue was divided between the Spanish and Portuguese claimants.

No evidence was offered to show which of the Africans were taken from the American vessel, and which from the Spanish and Portuguese; and the court below decreed that, as about one-third of them died, the loss should be averaged among these three different classes; and that sixteen should be designated, by lot, from the whole number, and delivered over to the marshal, according to the law of the United States, as being the fair proportion of the twenty-five, proved to have been taken from an American vessel.

The reasons assigned in the appellant's case, for reversing the decrees of the court below, were as follows:

1. That the possession of these Africans by the claimants, before the capture by the privateer, affords no presumption that they were their property; that they must show a law entitling them to hold them as property.

2. That if these Africans are to be considered as having been in a state of slavery, when in the Spanish and Portuguese vessels from which they were taken, and if the court shall consider itself bound to restore them to the condition from which they were taken, this can be done only by placing them in the hands of those who shall prove themselves to have been the owners; and



that this purpose cannot be answered by restoring them to the consuls of Spain and Portugal.

3. That if some of these Africans were the property of the claimants, yet some are not; and, failing to prove which were theirs, the decree is erroneous, in determining by lot a matter which the claimants were bound to establish by proof.

Marshall, C. J., delivered the opinion of the court, and, after stating the case, proceeded as follows:

In prosecuting this appeal, the United States assert no property in themselves. They appear in the character of guardians, or next friends, of these Africans, who are brought, without any act of their own, into the bosom of our country, insist on their right to freedom, and submit their claim to the laws of the land, and to the tribunals of the nation.

The consuls of Spain and Portugal, respectively, demand these Africans as slaves, who have, in the regular course of legitimate commerce, been acquired as property by the subjects of their respective sovereigns, and claim their restitution under the laws of the United States.

In examining claims of this momentous importance; claims in which the sacred rights of liberty and of property come in conflict with each other; which have drawn from the bar a degree of talent and of eloquence, worthy of the questions that have been discussed; this court must not yield to feelings which might seduce it from the path of duty, and must obey the mandate of the law.

That the course of opinion on the slave trade should be unsettled, ought to excite no surprise. The Christian and civilized nations of the world, with whom we have most intercourse, have all been engaged in it.

However abhorrent this traffic may be to a mind whose original feelings are not blunted by familiarity with the practice, it has been sanctioned in modern times by the laws of all nations who possess distant colonies, each of whom has engaged in it as a common commercial business which no other could rightfully interrupt. It has claimed all the sanction which could be derived from long usage and general acquiescence. That trade could not be considered as contrary to the law of nations which was authorized and protected by the laws of all commercial nations; the right to carry on which was claimed by each, and allowed by each.

The course of unexamined opinion which was founded on this inveterate usage, received its first check in America; and, as soon as these States acquired the right of self-government, the traffic was forbidden by the most of them. In the beginning of this century several humane and enlightened individuals of Great Britain devoted themselves to the cause of the Africans; and, by frequent appeals to the nation, in which the enormity of this commerce was unveiled and exposed to the public eye, the general sentiment was at length aroused against it, and the feelings of justice and humanity, regaining their long-lost ascendancy, prevailed so far in the British Parliament as to obtain an act for its abolition. The utmost efforts of the British Government, as well as that of the United States, have since been assiduously employed in its suppression. It has been denounced by both in terms of great severity, and those concerned in it are subjected to the heaviest penalties which law can inflict. In addition to these measures operating on their own people, they have used all their influence to bring other nations into the same system, and to interdict this trade by the consent of all.

Public sentiment has, in both countries, kept pace with the measures of government; and the opinion is extensively, if not universally entertained, that this mutual traffic ought to be suppressed. While its illegality is asserted by some governments, but not admitted by all; while the detestation in which it is held is growing daily, and even those nations who tolerate it in fact, almost disavow their own conduct, and rather connive at than legalize the acts of their subjects; it is not wonderful that public feeling should march somewhat in advance of strict law, and that opposite opinions should be entertained on the precise cases in which our own laws may control and limit the practice of others. Indeed, we ought not to be surprised if, on this novel series of cases, even the courts of justice should, in some instances, have carried the principle of suppression further than a more deliberate consideration of the subject would justify.

The *Amedie*, I. Acton's Rep., 240, which was an American vessel employed in the African trade, was captured by a British cruiser and condemned in the Vice-Admiralty Court of Tortola. An appeal was prayed, and Sir William Grant, in delivering the opinion of the court, said that the trade being then declared unjust and unlawful by Great Britain, "a claimant could have no right, upon principles of universal law, to claim restitution in a prize court, of human beings carried as slaves. He must show some right that has been violated by the capture, some property of which he has been dispossessed, and to which he ought to be restored. In this case the laws of the claimant's country allow of no right of property such as he claims. There can, therefore, be no right of restitution. The consequence is that the

judgment must be affirmed." The *Fortuna*, I. Dodson, 81, was condemned on the authority of the *Amedie*, and the same principle was again affirmed.

The *Diana*, 1 Dodson, 95, was a Swedish vessel, captured with a cargo of slaves, by a British cruiser, and condemned in the Court of Vice-Admiralty at Sierra Leone. This sentence was reversed on appeal, and Sir William Scott, in pronouncing the sentence of reversal, said, "The condemnation also took place on a principle which this court cannot in any manner recognize, inasmuch as the sentence affirms, 'that the slave trade, from motives of humanity, hath been abolished by most civilized nations, and is not, at the present time, legally authorized by any.' This appears to me to be an assertion by no means sustainable." The ship and cargo were restored, on the principle that the trade was allowed by the laws of Sweden.

The principle common to these cases is, that the legality of the capture of a vessel engaged in the slave trade depends upon the law of the country to which the vessel belongs. If that law gives its sanction to the trade, restitution will be decreed; if that law prohibits it, the vessel and cargo will be condemned as good prize.

This whole subject came on afterwards to be considered in *The Louis*, 2 Dodson, 238. The opinion of Sir William Scott, in that case, demonstrates the attention he had bestowed upon it, and gives full assurance that it may be considered as settling the law in the British courts of admiralty, as far as it goes.

The *Louis* was a French vessel, captured on a slaving voyage, before she had purchased any slaves, brought into Sierra Leone, and condemned by the vice-admiralty court at that place. On an appeal to the Court of Admiralty, in England, the sentence was reversed.

In the very full and elaborate opinion given in this case, Sir William Scott, in explicit terms, lays down the broad principle that the right of search is confined to a state of war. It is a right strictly belligerent in character, which can never be exercised by a nation at peace, except against professed pirates, who are the enemies of the human race. The act of trading in slaves, however detestable, was not, he said, "the act of freebooters, enemies of the human race, renouncing every country, and ravaging every country, in its coasts and vessels, indiscriminately." It was not piracy.

He also said that this trade could not be pronounced contrary to the law of nations. "A court, in the administration of the law, cannot attribute criminality to an act where the law imputes none. It must look to the legal standard of morality; and upon a question of this nature, that standard must be found in the law of nations, as fixed and evidenced by general, and ancient, and admitted practice, by treaties, and by the general tenor of the laws and ordinances, and the formal transactions of civilized states; and, looking to these authorities, he found a difficulty in maintaining that the transaction was legally criminal."

The right of visitation and search being strictly a belligerent right, and the slave trade being neither piratical, nor contrary to the law of nations, the principle is asserted and maintained with great strength of reasoning, that it cannot be exercised on the vessels of a foreign power, unless permitted by treaty. France had refused to assent to the insertion of such an article in her treaty with Great Britain, and, consequently, the right could not be exercised on the high seas by a British cruiser on a French vessel.

"It is pressed as a difficulty," says the judge, "what is to be done if a French ship, laden with slaves, is brought in? I answer, without hesitation, restore the possession which has been unlawfully divested; rescind the illegal act done by your own subject, and leave the foreigner to the justice of his own country."

This reasoning goes far in support of the proposition that, in the British courts of admiralty, the vessel even of a nation which had forbidden the slave trade, but had not conceded the right of search, must, if wrongfully brought in, be restored to the original owner. But the judge goes further, and shows that no evidence existed to prove that France had, by law, forbidden that trade. Consequently, for this reason, as well as for that previously assigned, the sentence of condemnation was reversed, and restitution was awarded.

In the United States different opinions have been entertained in the different circuits and districts; and the subject is now, for the first time, before this court.

The question, whether the slave trade is prohibited by the law of nations has been seriously propounded, and both the affirmative and negative of the proposition have been maintained with equal earnestness.

That it is contrary to the law of nature will scarcely be denied. That every man has a natural right to the fruits of his own labor is generally admitted; and that no other person can rightfully deprive him of those fruits, and appropriate them against his will, seems to be the necessary result of this admission. But from the earliest times war has existed, and war confers the rights in which all have acquiesced. Among the most enlightened nations of antiquity one of these was that the victor might enslave the vanquished. This, which was the

usage of all, could not be pronounced repugnant to the law of nations, which is certainly to be tried by the test of general usage. That which has received the assent of all, must be the law of all.

Slavery, then, has its origin in force; but as the world has agreed that it is a legitimate result of force, the state of things which is thus produced by general consent cannot be pronounced unlawful.

Throughout Christendom this harsh rule has been exploded, and war is no longer considered as giving a right to enslave captives. But this triumph of humanity has not been universal. The parties to the modern law of nations do not propagate their principles by force; and Africa has not yet adopted them. Throughout the whole extent of that immense continent, so far as we know its history, it is still the law of nations that prisoners are slaves. Can those who have themselves renounced this law be permitted to participate in its effects by purchasing the beings who are its victims?

Whatever might be the answer of a moralist to this question, a jurist must search for its legal solution in those principles of action which are sanctioned by the usages, the national acts, and the general assent of that portion of the world of which he considers himself as a part, and to whose law the appeal is made. If we resort to this standard as the test of international law, the question, as has already been observed, is decided in favor of the legality of the trade. Both Europe and America embarked in it; and for nearly two centuries it was carried on without opposition, and without censure. A jurist could not say, that a practice thus supported was illegal, and that those engaged in it might be

punished, either personally or by deprivation of property.

In this commerce, thus sanctioned by universal assent, every nation had an equal right to engage. How is this right to be lost? Each may renounce it for its own people; but can this renunciation affect others?

No principle of general law is more universally acknowledged than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone. A right, then, which is vested in all by the consent of all, can be divested only by consent; and this trade, in which all have participated, must remain lawful to those who cannot be induced to relinquish it. As no nation can prescribe a rule for others, none can make a law of nations; and this traffic remains lawful to those whose governments have not forbidden it.

If it is consistent with the law of nations, it cannot in itself be piracy. It can be made so only by statute; and the obligation of the statute cannot transcend the legislative power of the state which may enact it.

If it be neither repugnant to the law of nations, nor piracy, it is almost superfluous to say in this court, that the right of bringing in for adjudication in time of peace, even where the vessel belongs to a nation which has prohibited the trade, cannot exist. The courts of no country execute the penal laws of another; and the course of the American Government on the subject of visitation and search, would decide any case in which that right had been exercised by an American cruiser,



on the vessel of a foreign nation, not violating our municipal laws, against the captors.

It follows that a foreign vessel engaged in the African slave trade, captured on the high seas in the time of peace, by an American cruiser, and brought in for adjudication, would be restored.

The general question being disposed of, it remains to examine the circumstances of the particular case.

The *Antelope*, a vessel unquestionably belonging to Spanish subjects, was captured while receiving a cargo of Africans on the coast of Africa, by *The Arraganta*, a privateer which was manned in Baltimore, and is said to have been under the flag of the Oriental Republic. Some other vessels, said to be Portuguese, engaged in the same traffic, were previously plundered, and the slaves taken from them, as well as from another vessel then in the same port, were put on board *The Antelope*, of which vessel *The Arraganta* took possession, landed her crew, and put on board a prize master and prize crew. Both vessels proceeded to the coast of Brazil, where the *Arraganta* was wrecked, and her captain and crew lost or made prisoners.

*The Antelope*, whose name was changed to *The General Ramirez*, after an ineffectual attempt to sell the Africans on board at Surinam, arrived off the coast of Florida, and was hovering on that coast, near that of the United States, for several days. Supposing her to be a pirate, or a vessel wishing to smuggle slaves into the United States, Captain Jackson, of the revenue cutter *Dallas*, went in quest of her, and, finding her laden with slaves, commanded by officers who were citizens of the United States, with a crew who spoke English, brought her in for adjudication.

She was libeled by the vice-consuls of Spain and Portugal, each of whom claim that portion of the slaves which were conjectured to belong to the subjects of their respective sovereigns; which claims are opposed by the United States on behalf of the Africans.

In the argument, the question on whom the *onus probandi* is imposed, has been considered of great importance, and the testimony adduced by the parties has been critically examined. It is contended that The Antelope, having been wrongfully dispossessed of her slaves by American citizens, and being now, together with her cargo, in the power of the United States, ought to be restored, without further inquiry, to those out of whose possession she was thus wrongfully taken. No proof of property, it is said, ought to be required. Possession is in such a case evidence of property.

Conceding this as a general proposition, the counsel for the United States deny its application to this case. A distinction is taken between men, who are generally free, and goods, which are always property. Although, with respect to the last, possession may constitute the only proof of property which is demandable, something more is necessary where men are claimed. Some proof should be exhibited that the possession was legally acquired. A distinction has been also drawn between Africans unlawfully taken from the subjects of a foreign power by persons acting under the authority of the United States, and Africans first captured by a belligerent privateer, or by a pirate, and then brought rightfully into the United States, under a reasonable apprehension that a violation of their laws was intended. Being rightfully in the possession of an American court, that court, it is contended, must be governed by the

laws of its own country; and the condition of these Africans must depend on the laws of the United States, not on the laws of Spain or Portugal.

Had The Arraganta been a regularly commissioned cruiser, which had committed no infraction of the neutrality of the United States, her capture of The Antelope must have been considered lawful, and no question could have arisen respecting the rights of the original claimants. The question of prize or no prize belongs solely to the courts of the captor. But, having violated the neutrality of the United States, and having entered our ports, not voluntarily, but under coercion, some difficulty exists respecting the extent of the obligation to restore, on the mere proof of former possession, which is imposed on this Government.

If, as is charged in the libels of both the consuls, as well as of the United States, she was a pirate, hovering on the coast, with intent to introduce slaves, in violation of the laws of the United States, our treaty requires that property rescued from pirates shall be restored to the Spanish owner, on his making proof of his property.

Whether The General Ramirez, originally The Antelope, is to be considered as the prize of a commissioned belligerent ship of war unlawfully equipped in the United States, or as a pirate, it seems proper to make some inquiry into the title of the claimants.

In support of the Spanish claim, testimony is produced, showing the documents under which The Antelope sailed from Havana, on the voyage on which she was captured; that she was owned by a Spanish house of trade in that place; that she was employed in the business of purchasing slaves, and had purchased and taken

on board a considerable number, when she was seized as a prize by *The Arraganta*.

Whether, on this proof, Africans brought into the United States, under the various circumstances belonging to this case, ought to be restored or not, is a question on which much difficulty has been felt. It is unnecessary to state the reasons in support of the affirmative or negative answer to it, because the court is divided on it, and, consequently, no principle is settled. So much of the decree of the Circuit Court as directs restitution to the Spanish claimant of the Africans found on board *The Antelope* when she was captured by *The Arraganta*, is affirmed.

#### THE RESOLUTION.

(6 Robinson's Admiralty Report's, 18.)

#### JOINT CAPTURE AND SALVAGE.

##### Judgment.

Sir William Scott.—This was an American ship, with some French passengers and French property on board, seized on a voyage from Monte Video to Havre de Grace, and brought to Plymouth by the King's ship *The Pickle*. At the time of the seizure there were on board three persons, no part of the crew, but asserting themselves to be prize masters, put on board by two privateers which had fallen in with this vessel in the early periods of her voyage. It appears that the agent of *The Pickle* brought in the papers, and proceeded to take the preparatory examinations, before Smith, the prize master of one of the privateers, was allowed to come on shore; and that Smith was afterwards impressed and taken out of the way. This representation is made on the affidavits to

Mr. Delacombe, the agent of *The Mary*, and is not contradicted. It is a fact, therefore, which I must take to be true, and one which tends to give no very favorable impression of the case, on the part of *The Pickle*. It was the evident duty of the persons proceeding to adjudication on behalf of *The Pickle*, to have taken care that no obstruction was thrown in the way of this person, to prevent him from coming forward to assert the interest of his ship. Instead of that, the prize master is forcibly prevented from asserting his claim. This circumstance alone would deduct very materially from the effect of the examination; and there are other circumstances which go farther, to deprive them of all credit. The account given by the American master is, "that he was first detained by the private ship of war *The Mary*; that the commander, John Roalf, desired the deponent to take two of his crew on board, to give *The Mary* a share of the capture, should the said ship be afterwards detained by any other ship of war, which he, this deponent, consented to, but never gave them the command or direction of said ship." The affidavit of the master of *The Mary* gives a very different representation of the matter. It states, "that he opened the letter delivered to him, and finding that the French property on board was not so trifling as had been represented, he resolved to seize; that the appearer, Henry Smith, was immediately put on board as prize master, with a certificate of his situation, and also George Knight, a mariner of and belonging to said private ship of war, with orders to make the first English port in the Channel; that this appearer, J. Roalf, did not put any more men on board, by reason that the American crew expressly agreed to submit and obey the prize master." On the truth of these

different accounts the whole case will depend. Now, with regard to the asserted capture by *The Mary*, the first consideration is, whether the facts stated in the master's affidavit are credible. I shall afterwards have occasion to observe what is necessary to constitute capture. On the question of fact, I see no incredibility; if it had appeared, as it was represented in argument, that *The Mary* had at first relinquished the purpose of seizing, on a supposition that the amount of the French property on board was too inconsiderable to induce her to seize, and that no circumstances afterwards transpired to lead to an alteration of that purpose; there might have been reason to maintain, that no act of capture was intended by putting the two men on board; but the master says, "that he only affected to think the value of the property not sufficient, and professed an intention of leaving it, for the purpose of obtaining more evidence of what was actually on board." In that view of the case, I cannot but think that the letter which was committed to his care to be forwarded to America, did contain matter that might naturally induce him to suspect that the French property on board was not so inconsiderable, since the terms are not confined to any small parcels only, but say generally, "We have French property on board." I do not see, therefore, that there is any thing incredible in this representation. But it is said that the conduct pursued was such as never could enter into the mind of any man, to put two persons unarmed on board a ship, to take her across the Atlantic into a British port, in opposition to the resistance which they must expect to encounter if not from the American master himself, yet certainly from the Frenchmen on board, who were more in number than themselves. Undoubt-

edly it was not a very prudent measure; it was, perhaps an act of rash confidence; but when I consider that the neutral master acquiesced by his own account, in taking two men on board, and that it might naturally be indifferent to him whether he went into an English or a French port, I cannot think that the act is of such a nature as to be altogether improbable. It is true that a cruiser has no right to compel neutral masters to make a promise of this kind; but if they choose to enter into such an engagement, the neutral nation sustains no injury from it; and it is fully competent to the master of the privateer to act under it. It is a mere question of prudence whether he will trust to the word of the neutral master, or whether he will take the more effectual precaution of putting a sufficient force on board. As to the objection that the papers were not taken into the immediate possession of the prize master, or that the navigation of the ship was left to the neutral master, I do not see that either of these circumstances are material.

The papers remained on board the ship, and it is by no means necessary to constitute a prize master, that he should take upon himself the navigation of the vessel. If the ship had voluntarily come into a British port under this engagement, and proceedings had been instituted in this court on the part of the first captor, I am not aware of any legal objection that should have prevented the court from condemning the French property on board as lawful prize to *The Mary*. On this part of the case, I do not see that there is either any incredibility or any illegality, in the account given of the transaction, by the master of *The Mary*. Then let us look at the case as it stands upon the preparatory depositions. The American master states on his examination,

which I am always to remember was taken in the absence of Smith, "that the two men were put on board only for the purpose of founding a claim to share in any capture that might be made." The fact itself seems to be incredible, that two men should be put on board for that purpose, when it could not possibly have any such effect, and as to the credit of the master, who admits himself to have been concerned in this scheme, what reliance can I place on him as a witness? By his own representation it was a fraudulent act, in which he concurred, to give a claim of joint capture where no right whatever existed; and his title to credibility is not much mended, by observing that he was so ready to break the promise which he had so made. It is also utterly improbable that two persons should allow themselves to be made the instruments of such a scheme, since it would be little less than an act of insanity in them, as British sailors, to go on board with a chance of being carried into Havre, there to enjoy all the luxuries of a French prison. Who can find faith to believe such a representation?

I profess that I cannot. I am under the necessity of giving credit to the account given in the affidavit of the master of the *Mary*; and though the privateer had no right to compel such an engagement, if the neutral master promised to go into a British port, without more force being put upon him, I am of the opinion that the act of seizure under such circumstances would be fully sufficient in law to constitute a capture. If this be so, it puts an end to the case on the part of the second privateer: If force was all that was required to make the first seizure complete, it would be impossible to ascribe more effect to the one man put on board from this vessel, than to the two which had before been put on board



from the *Mary*. Then, the only question that remains is, as to the king's ship, whether she can sustain a claim of capture, or an interest of any other kind? The capture I have already pronounced to have been made before; but I think there is enough disclosed in the evidence to support a claim of salvage on behalf of the *Pickle*. The prize-master of the *Mary* admits "that he had been informed of an intention of the American master, to carry the vessel into Havre, and that he had applied to the captain of the *Pickle* for assistance." This is in effect an admission that the capture on his part would not have been complete without the aid of the schooner. It is, I think, sufficient to found an interest in the nature of a salvage claim; and I should have been disposed to consider this claim more liberally, if the proceedings had not in the first instance been carried on in the absence of the prize-master of the *Mary*, and for the purpose of establishing a title of capture, which I have pronounced not to have been well founded. The value of the property condemned is stated to be about £1,100. I shall pronounce for a salvage of £200, with expenses.

#### THE MARIA.

(1 Robinson's Admiralty Reports, 287.)

#### THE RIGHT OF CONVOY.

##### Judgment.

Sir W. Scott—This ship was taken in the British channel in company with several other Swedish vessels sailing under convoy of a Swedish frigate, having cargoes of naval stores and other produce of Sweden on

board, by a British squadron under the command of Commodore Lawford.

The only special considerations which I shall notice in favor of Great Britain (and which I am entirely desirous of allowing to Sweden in the same or similar circumstances) is, that the nature of the present war does give this country the rights of war, relatively to neutral states, in as large a measure as they have been regularly and legally exercised, at any period of modern civilized times. Whether I estimate the nature of the war justly, I leave to the judgment of Europe, when I declare that I consider this as a war in which neutral states themselves have an interest much more direct and substantial than they have in the ordinary, limited, and private quarrels (if I may so call them) of Great Britain and its great public enemy. That I have a right to advert to such considerations, provided it be done with sobriety and truth, cannot, I think, reasonably be doubted—and if authority is required, I have authority—and not the less weighty in this question for being Swedish authority—I mean the opinion of that distinguished person, one of the most distinguished which that country (fertile as it has been of eminent men) has ever produced; I mean Baron Puffendorff: The passage to which I allude is to be found in the note of Barbeyrac's, on his larger work, L. 8. c. 6. s. 8—Puffendorff had been consulted in the beginning of the present century, when England and other states were engaged in the confederacy against Louis XIV by a lawyer upon the continent, Groningius, who was desirous of supporting the claim of neutral commerce, in a treatise which he was then projecting. Puffendorff concludes his answer to him in these words:

“I am not surprised that the northern powers should consult the general interests of all Europe, without regard to the complaints of some greedy merchants, who care not how things go, provided they can but satisfy their thirst of gain. Those princes wisely judge that it would not become them to take precipitate measures, whilst other nations are combining their whole force to reduce within bounds an insolent and exorbitant power which threatens Europe with slavery, and the Protestant religion with destruction. This being the interest of the northern crowns themselves, it is neither just nor necessary that, for the present advantage, they should interrupt so salutary a design, especially as they are at no expense in the affair, and run no hazard.”— In the opinion, then, of this wise and virtuous Swede, the nature and purpose of a war was not entirely to be omitted in the consideration of the warrantable exercise of its rights, relatively to neutral states. — His words are memorable: I do not overrate their importance, when I pronounce them to be well entitled to the attention of his country.

It might likewise be improper for me to pass entirely without notice, as another preliminary observation, (though without meaning to lay any particular stress upon it,) that the transaction in question took place in the British channel, close upon the British coast, a station over which the Crown of England has from pretty remote antiquity, always asserted something of that special jurisdiction which the sovereigns of other countries have claimed and exercised over certain parts of the seas adjoining to their coasts.

In considering the case, I think it will be advisable for me, first, to state the facts as they appear in the

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evidence; secondly, to lay down the principles of law which apply generally to such a state of facts; thirdly, to examine whether any special circumstances attended the transaction in any part of it, which ought in any manner or degree to affect the application of these principles.

The facts of the capture are to be learnt only from the captors; for, as I have observed, the claimants have been entirely silent about them, and that silence gives the strongest confirmation to the truth of the accounts delivered by the captors.

The attestation of Captain Lawford introduces and verifies his log-book, in which it is stated, that after the meeting of the fleets he sent an officer on board the frigate to inquire about the cargoes and destination of the merchantmen, and was answered, "that they were Swedes, bound to different ports in the Mediterranean, laden with hemp, iron, pitch and tar." Upon doubt, which Captain Lawford entertained respecting the conduct he should hold in a situation of some delicacy, he dispatched immediately a messenger to the Admiralty, keeping the convoy in his view; and having received orders from the Admiralty by the return of his messenger to detain these merchant ships and carry them into the nearest English port, he sent Sir Charles Lindsay and Capt. Raper to communicate them in the civilest terms to the Swedish commodore, who showed his instructions to repel force by force if any attempt was made to board the convoy, and declared that he should defend them to the last. The crew of the Swedish frigate were immediately at quarters, matches lighted, and every preparation made for an obstinate resistance; and the signal was made on board the British squadron to

prepare for battle. In the night, possession was taken of most of the vessels, the Swedish frigate making many movements, which were narrowly watched by the Romney keeping close under his lee, lower deck guns run out, and every man at his quarters. In the morning the Swedish frigate hoisted out an armed boat, and sent on board one of the vessels which had been taken possession of, and took out by force the British officer who had been left on board, and carried him on board the frigate, where he was detained. The Swedish commander sent an officer of his own on board, Capt. Lawford, to complain that he had taken advantage of the night to get possession of his convoy, which was unobserved by him, or he should have assuredly defended them to the last. Upon further conference and representation of the impracticability of resistance to such a superior force, he at length agreed to go into Margate Roads, and returned the British officer who had been taken out and detained on board the frigate. After the arrival in Margate Roads he lamented that he had not exchanged broadsides; said that he did not consider his convoy as detained, and should resist any further attempt to take possession of them.

This being the actual state of the fact, it is proper for me to examine, secondly, what is their legal state, or, in other words, to what considerations they are justly subject according to the law of nations; for which purpose I state a few principles of that system of law which I take to be incontrovertible.

First, that the right of visiting and searching merchant ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestable right of the lawfully commissioned

cruisers of a belligerent nation. I say, be the ships, the cargoes, and the destinations what they may, because till they are visited and searched, it does not appear what the ships, or the cargoes, or the destinations are; and it is for the purpose of ascertaining these points that the necessity of this right of visitation and search exists. This right is so clear in principle, that no man can deny it who admits the legality of maritime capture; because if you are not at liberty to ascertain by sufficient inquiry whether there is property that can legally be captured, it is impossible to capture. Even those who contend for the inadmissible rule, that free ships make free goods, must admit the exercise of this right at least for the purpose of ascertaining whether the ships are free ships or not. The right is equally clear in practice; for practice is uniform and universal upon the subject. The many European treaties which refer to this right, refer to it as pre-existing, and merely regulate the exercise of it. All writers upon the law of nations unanimously acknowledge it, without the exception even of Hubner himself, the great champion of neutral privileges. In short, no man in the least degree conversant in subjects of this kind has ever, that I know of, breathed a doubt upon it. The right must unquestionably be exercised with as little of personal harshness and of vexation in the mode as possible; but soften it as much as you can, it is still a right of force, though of lawful force—something in the nature of civil process, where force is employed, but a lawful force, which cannot lawfully be resisted. For it is a wild conceit that wherever force is used, it may be forcibly resisted; a lawful force cannot lawfully be resisted. The only case where it can be so in matters of this nature, is in

the state of war and conflict between two countries, where one party has a perfect right to attack by force, and the other has an equally perfect right to repel by force. But in the relative situation of two countries at peace with each other, no such conflicting rights can possibly co-exist.

Secondly, that the authority of the Sovereign of the neutral country being interposed in any manner of mere force cannot *legally* vary the rights of a lawfully-commissioned belligerent cruiser; I say *legally*, because what may be given, or be fit to be given, in the administration of this species of law, to considerations of comity or of national policy, are views of the matter which, sitting in this Court, I have no right to entertain. All that I assert is, that legally it cannot be maintained, that if a Swedish commissioned cruiser, during the wars of his own country, has a right by the law of nations to visit and examine neutral ships, the King of England, being neutral to Sweden, is authorized by that law to obstruct the exercise of that right with respect to the merchant-ships of his country. I add this, that I cannot but think that if he obstructed it by force, it would very much resemble (with all due reverence be it spoken) an opposition of illegal violence to legal right. Two sovereigns may unquestionably agree, if they think fit (as in some late instances they have agreed), by special covenant, that the presence of one of their armed ships along with their merchant-ships shall be mutually understood to imply that nothing is to be found in that convoy of merchant-ships inconsistent with amity or neutrality; and if they consent to accept this pledge, no third party has a right to quarrel with it any more than with any other pledge which they may

agree mutually to accept. But surely no sovereign can legally compel the acceptance of such a security by mere force. The only security known to the law of nations upon this subject, independent of all special covenant, is the right of personal visitation and search, to be exercised by those who have the interest in making it. I am not ignorant, that amongst the loose doctrines which modern fancy, under the various denominations of philosophy and philanthropy, and I know not what, have thrown upon the world, it has been within these few years advanced, or rather insinuated, that it might possibly be well if such a security were accepted. Upon such unauthorized speculations it is not necessary for me to descant: the law and practice of nations (I include particularly the practice of Sweden when it happens to be belligerent), give them no sort of countenance; and until that law and practice are new-modeled in such a way as may surrender the known and ancient rights of some nations to the present convenience of other nations (which nations may perhaps remember to forget them, when they happen to be themselves belligerent), no reverence is due to them; they are the elements of that system which, if it is consistent, has for its real purpose an entire abolition of capture in war—that is, in other words, to change the nature of hostility, as it has ever existed amongst mankind, and to introduce a state of things not yet seen in the world, that of a military war and a commercial peace. If it were fit that such a state should be introduced, it is at least necessary that it should be introduced in an avowed and intelligible manner, and not in a way which, professing gravely to adhere to that system which has for centuries prevailed among civilized states, and urg-



ing at the same time a pretension utterly inconsistent with all its known principles, delivers over the whole matter at once to eternal controversy and conflict, at the expense of the constant hazard of the harmony of the states, and of the lives and safety of innocent individuals.

Thirdly, that the penalty for the violent contravention of this right is the confiscation of the property so withheld from visitation and search. For the proof of this I need only to refer to Vattel, one of the most correct and certainly not the least indulgent of modern professors of public law. In his book III. c. vii. sect. 114, he expresses himself thus: "*On ne peut empêcher le transport des effets de contrabande si l'on ne visite pas les vaisseaux neutres que l'on rencontre en mer. On est donc en droit de les visiter. Quelques nations puissantes ont refusé en différents temps de se soumettre à cette visite, aujourd'hui un vaisseau neutre, qui refuseroit de souffrir la visite se feroit condamner par cela seul, comme étant de bonne prise.*" Vattel is here to be considered not as a lawyer merely delivering an opinion, but as a witness asserting the fact—the fact that such is the existing practice of modern Europe. And to be sure the only marvel in the case is, that he should mention it as a law merely modern, when it is remembered that it is a principle, not only of the civil law (on which great part of the law of nations is founded), but of the private jurisprudence of most countries in Europe,—that a contumacious refusal to submit to fair inquiry infers all the penalties of convicted guilt. Conformably to this principle we find in the celebrated French Ordinance of 1681, now in force, Article 12, "That every vessel shall be good prize in case of resistance and combat," and Valin, in his smaller

Commentary, p. 81, says expressly, that although the expression is in the conjunctive, yet that the resistance alone is sufficient. He refers to the Spanish Ordinance 1718, evidently copied from it, in which it is expressed in the disjunctive, "in case of resistance or combat."

And recent instances are at hand and within view, in which it appears that Spain continues to act upon this principle. The first time in which it occurs to my notice on the inquiries I have been able to make in the institutes of our own country respecting matters of this nature, excepting what occurs in the Black Book of the Admiralty, is in the Order of Council, 1664, Article 12, which directs, "That when any ship met withal by the royal navy or other ship commissioned, shall fight or make resistance, the said ship and goods shall be adjudged lawful prize." A similar article occurs in the Proclamation of 1672. I am aware, that in those orders and proclamations are to be found some articles not very consistent with the law of nations as understood now, or indeed at that time; for they are expressly censured by Lord Clarendon. But the article I refer to is not of those he reprehends; and it is observable that Sir Robert Wiseman, then the king's advocate general, who reported upon the articles in 1673, expresses a disapprobation of some of them as harsh and novel, does not mark this article with any observation of censure. I am therefore warranted in saying, that it was the rule, and the undisputed rule, of the British Admiralty. I will not say that rule may not have been broken in upon in some instances by considerations of comity or of policy, by which it may be fit that the administration of this species of law should be tempered in the hands of those tribunals which have a

right to entertain and apply them, for no man can deny that a state may recede from its extreme rights, and that its supreme councils are authorized to determine in what cases it may be fit to do so, the particular captor having in no case any other right and title than what the state itself would possess under the same facts of capture. But I stand with confidence upon all fair principles of reason,—upon the Institutes of other great maritime countries as well as those of our own countries—when I venture to lay it down, that by the law of nations, as now understood, a deliberate and continued resistance to search, on the part of a neutral vessel to a lawful cruiser, is followed by the legal consequences of confiscation.

3. The third proposed inquiry was, whether any special circumstances preceded, accompanied, or followed the transaction which ought in any manner or degree to affect the application of the general principles?

The first ground of exemption stated on the part of the claimants is the treaty with Sweden 1661, article 12, and it was insisted by Dr. Lawrence, that although the belligerent country is authorized by the treaty to exercise rights of inquiry in the first instance, yet that these rights were not exercised in the manner therein prescribed. It is an obvious answer to that observation, that this treaty never had in its contemplation the extraordinary case of an armed vessel sent in company with merchantmen for the very purpose of beating off all inquiry and search. On the contrary, it supposes an inquiry for certain papers, and if they are not exhibited, or “there is any other just and strong cause of suspicion,” then the ship is to undergo search. The treaty, therefore, recognizes the rights of inquiry and

search, and the violation of those rights is not less a violation of the treaty than it is of the general law of nations. It is said that the demand ought first to have been made upon the frigate; I know of no other rule but that of mere courtesy which requires this; for this extraordinary case of an armed ship traveling along with merchant ships is not a *casus foederis* that is at all so provided for in the treaty; however, if it is a rule, it was complied with in the present instance and the answer returned was, that "they were Swedish ships bound to various ports in the Mediterranean, laden with iron, hemp, pitch and tar." The question then comes, what rights accrued upon the receipt of this answer? I say, first, that a right accrued of sending on board each particular ship for their several papers; for each particular ship, without doubt, had its own papers; the frigate could not have them; and the captors had a right to send on board them to demand those papers, as well under the treaty as under the general law. A second right that accrued upon the receiving of this answer was, a right of detaining such vessels as were carrying cargoes so composed, either wholly or in part, to any ports of the enemies of this country; for that tar, pitch, and hemp going to the enemy's use are liable to be seized as contraband in their own nature, cannot, I conceive, be doubted under the modern law of nations; though formerly, when the hostilities of Europe were less naval than they have since become, they were of a disputable nature, and perhaps continued so at the time of making their treaty, or at least at the time of making that treaty which is the basis of it, I mean the treaty in which Whitlock was employed in the year 1656; for I conceive that Valin expresses the truth of

this matter, when he says, p. 68, "De droit ces choses," (speaking of naval stores), "sont de contrabande aujourd'hui et depuis le commencement de ce siecle, ce qui n'etoit pas autrefois neanmoins;" and Vattel, the best recent writer upon the matters, explicitly admits amongst positive contraband, "les bois et tout ce que sert a la construction et a l'armement de vaisseaux de guerre." Upon this principle was founded the modern explanatory article of the Danish treaty, entered into in 1780, on the part of Great Britain, by a noble lord, then secretary of state, whose attention had been peculiarly turned to subjects of this nature. I am therefore of opinion, that although it might be shown that the nature of these commodities had been subject to some controversy in the time of Whitlock, when the fundamental treaty was constructed, and that therefore a discreet silence was observed respecting them in the composition of that treaty and of the latter treaty derived from it, yet that the exposition which the latter judgment and practice of Europe has given upon this subject would in some degree affect and apply what the treaties had been content to leave on that indefinite and disputable footing on which the notions then more generally prevailing in Europe had placed it. Certain it is, that in the year 1750 the Lords of Appeal in this country declared pitch and tar, the produce of Sweden, and on board a Swedish ship bound to a French port, to be contraband, and subject to confiscation, in the memorable case of the *Med Good's Hjelpe*. In the more modern understanding of this matter, goods of this nature being the produce of Sweden, and the actual property of Swedes, and conveyed by their own navigation, have been deemed, in British Courts of Admiralty, upon

a principle of indulgence to the native products and ordinary commerce of that country, subject only to the milder rights of pre-occupancy and pre-emption; or to the rights of preventing the goods from being carried to the enemy, and of applying them to your own use, making a just pecuniary compensation for them. But to these rights, being bound to an enemy's port, they are clearly subject, and may be detained without any violation of national or individual justice. Thirdly: another right accrued, that of bringing in for a more deliberate inquiry than could possibly be conducted at sea upon such a number of vessels, even those which professed to carry cargoes with a neutral destination. Was there or was there not the just and grave suspicion, which the treaty referred to, excited by the circumstances of such a number of vessels with such cargoes intended to sail all along the extended coasts of the several public enemies of this kingdom, under the protection of an armed frigate associated with them for the very purpose of beating off by force all particular inquiry? But supposing even that there was not, is this the manner in which the observance of the treaty or of the laws of nations is to be enforced? Certainly not by the treaty itself; for the remedy for infraction is provided in compensations to be levied, and punishments to be inflicted upon delinquents by their own respective sovereigns. Article 12. How stands it by the general law? I don't say that cases may not occur in which a ship may be authorized by the natural rights of self-preservation to defend itself against extreme violence threatened by a cruiser grossly abusing his commission; but where the utmost injury threatened is the being carried into the nearest port, subject to a full re-

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sponsibility in costs and damages if this is done vexatiously and without just cause; a merchant vessel has not the right to say for itself (and an armed vessel has no right to say for it), "I will submit to no such inquiry, but I will take the law into my hands by force." What is to be the issue if each neutral vessel has the right to judge for itself in the first instance whether it is rightly detained and to act upon that judgment to the extent of using force? — surely nothing but battle and bloodshed as often as there is anything like an equality of force or an equality of spirit. For how often will the case occur in which a neutral vessel will judge itself to be rightly detained? How far the peace of this world will be benefited by taking the matter from off of its present footing and putting it upon this, it is for the advocates of such a measure to explain. I take the rule of law to be, that the vessel shall submit to the inquiry proposed, looking with confidence to those tribunals whose noble office (and I hope not the least acceptable to them) is to relieve, by compensation, inconveniences, of this kind, where they have happened through accident or error; and to redress by compensation and punishment, injuries that have been committed by design.

The second special ground taken on the part of the claimant was that the intention was never carried into act. And I agree with Dr. Lawrence, that if the intention was voluntarily and clearly abandoned an intention to abandon, or even a slight hesitation about it, would not constitute a violation of rights. But how stands the facts in the present case? The intention gives away, so far as it does give away, only to the superior force, It is to those that give such instructions to recollect, that the averment of abandonment of intention cannot

possibly be set up, because the instructions are delivered to persons who are bound to obey them, and who have no authority to vary. The intention is necessarily unchangeable; and being so, I do not see the person who could fairly contradict me, if I was to assert that the delivery and acceptance of such instructions and the sailing under them, were such as to complete the acts of hostilities. However that might be, the present fact is, that the commander sails with instructions to prevent inquiry and search by force, which instructions he is bound to obey, and which he is prevented from acting upon to their utmost extent only by an irresistible force. Under such circumstances how does the presumption of abandonment arise? If it does, mark the consequences: If he meets with a superior force, he abandons his hostile purpose; if he meets with an inferior force, he carries it into complete effect. How much is this short of the ordinary state of hostilities? What is hostility? It is violence where you can use violence with success; and where you cannot, it is submission and striking your colors. Nothing can be more clear upon the perusal of these attestations than that this gentleman abandoned his purpose merely as a subdued person in an unequal contest. The resistance is carried on as far as it can be; and when it can maintain itself no longer, fugit indignata.

4. It is lastly said, that they have proceeded only against the merchant-vessels, and not against the frigate, the principal wrongdoer. On what grounds this was done—whether on that sort of comity and respect which is not usually shown to the immediate property of great and august sovereigns, or how otherwise, I am again not judicially informed; but it can be no legal



bar to the right of a plaintiff to proceed, that he has for some reason or other declined to proceed against another party against whom he has an equal or possibly a superior title. And as to the particular case of one vessel which had obtained her release and a redelivery of her papers, the act of the captors may perhaps furnish a reasonable ground of distinction with respect for her own special case; but its effect, be what it may, is confined to herself, and can be extended no farther.

I am of opinion, therefore, that special circumstances do not exist which can take the case out of the rule which is generally applicable to such a state of facts; and I have already stated that rule to be the confiscation of all the property forcibly withheld from inquiry and search. It may be fitting for anything that I know that other considerations should be interposed to soften the severity of the rule, if the rule can be justly taxed with severity; but I have neither the knowledge of any such considerations nor authority to apply them. If any negotiations have pledged (as has been intimated) the honor and good faith of the country, I can only say that it has been much the habit of this country to redeem pledges of so sacred a nature. But my business is merely to decide whether, in a court of the law of nations, a pretension can be legally maintained which has for its purpose neither more nor less than to extinguish the right of maritime capture in war; and to do this, how? By the direct use of hostile force on the part of a neutral state. It is high time that the legal merit of such a contention should be disposed of one way or the other—it has been for some few years past preparing in Europe—it is extremely fit that it should be brought to

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the test of a judicial decision; for a worse state of things cannot exist than that of an undetermined conflict between the ancient law of nations, as understood and practiced for centuries by civilized nations, and a modern project of innovation utterly inconsistent with it, and in my apprehension, not more inconsistent with it than with the amity of neighboring states, and the personal safety of their respective subjects.

This is the substance of what I have to pronounce judicially on this case, after weighing with the most anxious care the several facts and the learned arguments which have been applied to them. I deliver it to my country—and to foreign countries—with little diffidence in the rectitude of the judgment itself: I have still more satisfaction in feeling an entire confidence in the rectitude of the considerations under which it has been formed.

## CHAPTER V.

### PERSONS AND PROPERTY OF NEUTRALS WITHIN BELLIGERENT JURISDICTION.

We have in previous chapters considered the right of the belligerent over the persons and property of enemies, also his right over the persons and property of neutrals on the seas, there remains to be considered the question of the right of the belligerent over the persons and property of neutrals within belligerent jurisdiction. In this as in other respects the right of the belligerent has undergone a marked change. The extreme rights once exercised are no longer recognized and in fact would not be tolerated. Change of view.

While the persons and property of neutrals within the belligerent jurisdiction are not exempt from taxation for war purposes, this taxation must not be at a higher rate than that levied upon the citizens of the belligerent state. The same is true whether the taxation is exacted by the state or by an enemy in military occupation, in which case it is called contribution. In the latter case there is of course little danger that the neutral will be placed upon a worse footing than his neighbors, who are enemies of the military occupant. As he is not presumed to be hostile, he is not likely to be taxed as heavily as others in the same territory, if any distinction is made. Taxation for war purposes.

In case of bombardments or sieges, the neutral is not entitled to greater notice or better treatment in other ways than are the citizens of the enemy; nor, upon the other hand, is it allowable to discriminate against him. But here also the presumption of innocence is Treatment in case of siege.

much stronger in his favor than is the case with the non-combatants of the enemy and so he is generally treated with much greater leniency than are enemies under like circumstances. If, however, he is proven guilty of violating the martial law under which he is placed by virtue of his residence, the fact of his neutrality does not protect him.

What we have said applies only where neutrals are merely sojourners and have remained strictly neutral.

**Loss of neutral character.** If they have acquired a domicile within the belligerent state, they have to a considerable extent lost their character of neutrals and may even be required to serve in the army of the belligerent in whose territory they are domiciled, and, as to the other belligerent they have taken on enemy character to a certain extent. It is hardly necessary to say that if they take any active part in the hostilities, they sacrifice their neutral character and as regards the other belligerent are to be treated as enemies.

**When neutral property takes on the character of the territory in which it is located.** Property of a neutral, if the product of the enemy territory, or territory in the military occupation of the enemy, takes on enemy character, regardless of the residence of the neutral owner. As said by Sir. Wm. Scott in the case of *The Phoenix*, (5 Robinson 25): "The possession of the soil does impress upon the owner the character of the country, as far as the produce of the plantation is concerned, in its transportation to any other country, whatever the local residence of the owner may be. And as said by the Supreme Court of the United States in 9 Cranch 191: "Wherever the owner may reside, that land is hostile or friendly according to the condition of the country in which it is placed. It is no extravagant perversion of principle, nor is it a vio-

lent offence to the course of human opinion, to say that the proprietor so far as respects his interests in the land, partakes of its character; and that the produce, while the owner remains unchanged, is subject to the same disabilities. Although acquisitions made during war are not considered as permanent until confirmed by treaty, yet to every commercial and belligerent purpose, they are considered as a part of the domain of the conqueror, so long as he retains the possession and government of them." It goes without saying that when a neutral dedicates his property to the uses of either belligerent it becomes, as to the other belligerent, enemy property and subject to the laws as to enemy property wherever found.

The right of the belligerent to seize neutral property within his territory, or territory in his military occupation, and use it for hostile purposes is known as the right of angary. There is considerable doubt as to the existence of this right, except in cases of the most extreme necessity. It is also doubtful whether, apart from treaty, a right to compensation exists. A great many treaties have been entered into with South and Central American states providing for compensation in case of the exercise of the right. **Right of angary.**

During the eighteenth and the early part of the nineteenth centuries the right was freely exercised. A great- **Examples of exercise of the right.** er part of the French expedition to Egypt, in 1798, was carried in neutral vessels seized in French ports, and in other instances Napoleon did not scruple to exercise the right. (Hall's International Law, p. 767.) More recent examples of the exercise of the right are to be found during the Franco-Prussian War, when the Germans exercised it rather freely. They seized and used

for military purposes about seven hundred cars of the Central Swiss Railway and so much of the Austrian rolling stock as they could find. But far more attention was attracted, because more vigorous protests were entered, when, during the same war, several English vessels were seized by the Germans and sunk in the Seine at Duclair, for the purpose of preventing French gunboats from ascending the river and severing communications between the parts of the German army which were operating on opposite banks of the river. The protest was directed against the manner of its exercise rather than against the right, which was not disputed by the English government. It seems that the Germans sunk some of the vessels while their crews were still on board. In explaining this act, Count Bismarck said: "The report shows that a pressing danger was at hand, and every other means of meeting it was wanting; the case was therefore one of necessity, which even in time of peace may render the employment of the destruction of foreign property admissible under the reservation of indemnification." The English government demanded and received compensation on behalf of the owners of the vessels. This instance would seem to form a strong precedent in favor of the existence of the right, subject to the obligation of compensating the neutral owner.

**THIRTY HOGSHEADS OF SUGAR v. BOYLE.**

(9 Cranch, 191.)

**ENEMY CHARACTER ATTACHES TO PRODUCE OF NEUTRAL IN  
TERRITORY UNDER MILITARY OCCUPATION OF ENEMY.**

Marshall, C. J., delivered the opinion of the Court, as follows:

The island of Santa Cruz, belonging to the kingdom of Denmark, was subdued, during the late war, by the arms of his Britannic Majesty. Andrian Benjamin Bentzon, an officer of the Danish government, and a proprietor of land therein, withdrew from the island on its surrender, and has since resided in Denmark. The property of the inhabitants being secured to them, he still retained his estate in the island under the management of an agent, who shipped thirty hogsheads of sugar, the produce of that estate, on board a British ship, to a commercial house in London, on account and risk of the said A. B. Bentzon. On her passage, she was captured by the American privateer, *The Comet*, and brought into Baltimore, where the vessel and cargo were libeled as enemy property. A claim for these sugars was put in by Bentzon; but they were condemned with the rest of the cargo; and the sentence was affirmed in the Circuit Court. The claimant then appealed to this court.

Some doubt has been suggested whether Santa Cruz, while in the possession of Great Britain, could properly be considered as a British island. But for this doubt there can be no foundation. Although acquisitions made during war are not considered as permanent until confirmed by treaty, yet to every commercial and belligerent purpose, they are considered as a part of the domain of the conqueror, so long as he retains the possession and government of them. The island of Santa Cruz, after its capitulation, remained a British island until it was restored to Denmark.

Must the produce of a plantation in that island, shipped by the proprietor himself, who is a Dane residing in Denmark, be considered as British, and therefore enemy property?

In arguing this question, the counsel for the claimant has made two points.

1. That this case does not come within the rule applicable to shipments from an enemy country, even as laid down in the British courts of admiralty.

2. That the rule has not been rightly laid down in those courts, and consequently will not be adopted in this.

1. Does the rule laid down in the British courts of admiralty embrace this case?

It appears to the court that the case of *The Phoenix*, 5 Rob. 20, is precisely in point. In that case, a vessel was captured on a voyage from Surinam to Holland, and a part of the cargo was claimed by persons residing in Germany, then a neutral country, as the produce of their estates in Surinam.

The counsel for the captors considered the law of the case as entirely settled. The counsel for the claimant did not controvert this position. They admitted it; but endeavored to extricate their case from the general principle by giving it the protection of the treaty of Amiens. In pronouncing his opinion, Sir William Scott lays down the general rule, thus: "Certainly, nothing can be more decided and fixed, as the principle of this court, and of the supreme court, upon very solemn arguments, than that the possession of the soil does impress upon the owner the character of the country, as far as the produce of that plantation is concerned, in its transportation to any other country, whatever the local residence of the owner may be. This has been so repeatedly decided, both in this and the superior court, that it is no longer open to discussion. No question can be made on the point of law, at this day."



Afterwards, in the case of *The Vrow Anna Catharina*, 6 Rob. 269, Sir William Scott lays down the rule, and states its reason. "It cannot be doubted," he says, "that there are transactions so radically and fundamentally national as to impress the national character, independent of peace or war, and the local residence of the parties. The produce of a person's own plantation in the colony of the enemy, though shipped in time of peace, is liable to be considered as the property of the enemy, by reason that the proprietor has incorporated himself with the permanent interests of the nation as a holder of the soil, and is to be taken as a part of that country, in that particular transaction, independent of his own personal residence and occupation."

This rule, laid down with so much precision, does not, it is contended, embrace Mr. Bentzon's claim, because he has not "incorporated himself with the permanent interests of the nation." He acquired the property while Santa Cruz was a Danish colony, and he withdrew from the island when it became British.

This distinction does not appear to the court to be a sound one. The identification of the national character of the owner with that of the soil, in the particular transaction, is not placed on the dispositions with which he acquires the soil, or on his general character. The acquisition of land in Santa Cruz binds him, so far as respects that land, to the fate of Santa Cruz, whatever its destiny may be. While that island belonged to Denmark, the produce of the soil, while unsold, was, according to this rule, Danish property, whatever might be the general character of the particular proprietor. When the island became British, the soil and its pro-

duce, while that produce remained unsold, were British.

The general commercial or political character of Mr. Bentzon could not, according to this rule, affect this particular transaction. Although incorporated, so far as respects his general character, with the permanent interests of Denmark, he was incorporated, so far as respected his plantation in Santa Cruz, with the permanent interests of Santa Cruz, which was, at that time, British; and though, as a Dane, he was at war with Great Britain, and an enemy, yet, as a proprietor of land in Santa Cruz, he was no enemy; he could ship his produce to Great Britain in perfect safety.

The case is certainly within the rule as laid down in the British courts. The next inquiry is: how far will that rule be adopted in this country?

The law of nations is the great source from which we derive those rules, respecting belligerent and neutral rights, which are recognized by all civilized and commercial states throughout Europe and America. This law is in part unwritten, and in part conventional. To ascertain that which is unwritten, we resort to the great principles of reason and justice; but, as these principles will be differently understood by different nations under different circumstances, we consider them as being, in some degree, fixed and rendered stable by a series of judicial decisions. The decisions of the courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect. The decisions of the courts of every country show how the law of nations, in the given case, is understood in that country, and will be

considered in adopting the rule which is to prevail in this.

Without taking a comparative view of the justice or fairness of the rules established in the British courts, and of those established in the courts of other nations, there are circumstances not to be excluded from consideration, which give to those rules a claim to our attention that we cannot entirely disregard. The United States having, at one time, formed a component part of the British empire, their prize law was our prize law. When we separated, it continued to be our prize law, so far as it was adapted to our circumstances, and was not varied by the power which was capable of changing it.

It will not be advanced, in consequence of this former relation between the two countries, that any obvious misconstruction of public law, made by the British courts, will be considered as forming a rule for the American courts, or that any recent rule of the British courts is entitled to more respect than the recent rules of other countries. But a case professing to be decided on ancient principles will not be entirely disregarded, unless it be very unreasonable, or be founded on a construction rejected by other nations.

The rule laid down in *The Phoenix* is said to be a recent rule, because a case solemnly decided before the lords commissioners in 1783, is quoted in the margin as its authority. But that case is not suggested to have been determined contrary to former practice or former opinions. Nor do we perceive any reason for supposing it to be contrary to the rule of other nations in a similar case.

The opinion that ownership of the soil does, in some degree, connect the owner with the property, so far as

respects that soil, is an opinion which certainly prevails very extensively. It is not an unreasonable opinion. Personal property may follow the person anywhere; and its character, if found on the ocean, may depend on the domicile of the owner. But land is fixed. Wherever the owner may reside, that land is hostile or friendly, according to the condition of the country in which it is placed. It is no extravagant perversion of principle, nor is it a violent offence to the course of human opinion, to say that the proprietor, so far as respects his interest in this land, partakes of its character; and that the produce, while the owner remains unchanged, is subject to the same disabilities. In condemning the sugars of Mr. Bentzon, as enemy property, this court is of opinion that there was no error, and the sentence is affirmed, with costs.

## PART VI.

### NEED OF AN INTERNATIONAL CONFERENCE.

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#### CHAPTER I.

##### PRESENT NEED.

Were there ever any doubt as to the need of a conference of the nations for the purpose of arriving at a better understanding as to several questions of international law, the Russo-Japanese war should have dispelled such doubt. Nor were the unsettled questions which gave rise to disputes confined to the relations of the belligerents; in several instances the tension between the belligerents and neutrals approached the breaking point. With the rapidly increasing interdependence of nations due to the modern organization of industry, there is an ever increasing need of a definite agreement as to the rules governing international relations. That the need of definite rules is far greater now than when nations were to a great extent agricultural, and hence self-sufficing, and the means of communication were such as to bring them rarely into contact with each other, is clear. This is merely another way of saying that there was by no means the same need of international law a few centuries ago that exists today.

Nor is the close of a great war an inopportune time for an international conference. War always puts a severe strain upon law and lays bare the weak and faulty

Present time  
opportune for a  
conference.

parts which until the test came, were unnoticed. The necessity for amendment is fresh in the minds of all. There has been a rapid accumulation of experience and to some extent a new spirit is prevalent. While the lesson of the cost of war is still fresh in the mind, nations are more impressed with the advisability of avoiding it and take more kindly to suggestions which look to the attainment of this end.

That we may the better appreciate the need and the opportuneness of the time for an international conference, it is fitting that we turn from general considerations to an examination of some of the specific questions which should receive the most careful thought of the conference and upon which if possible an agreement should be reached.

Rights of belligerent vessels in neutral ports and waters.

Having in mind the experience of the recent war, there is little room for doubt that among the questions to be discussed, concerning which there is urgent need of a definite agreement, are the rights of belligerent vessels in neutral ports and waters, the extent to which the neutral may furnish them coal and provisions, the length of time they may lawfully remain when not in urgent need of repairs in order to make them seaworthy, and under what circumstances they should be required to disarm.

The twenty-four hour rule.

The twenty-four hour rule set forth by England in 1861, and followed by it, the United States, and some other countries, is perhaps sufficiently definite; but as this rule has never been adopted by France, the question cannot be said to be satisfactorily settled. Remembering the amount of friction caused by the indefiniteness of the French rule, there would be a strong incentive to fix upon a definite one, and it is not unreason-

able to suppose that a definite agreement could be reached. France would not now be under the same temptation to adhere to her interpretation of her duty as when that interpretation enabled her to render very material assistance to a needy ally. The rule as to coaling, repairs, and internment followed by most of the neutrals during the recent war could profitably be crystallized into a definite rule of law. The rule as to the latter would then be substantially the same in naval warfare as it is in warfare on land, and there seems to be no good reason why it should not be the same. <sup>Coaling, repairs, etc.</sup>

The Russo-Japanese war has also developed the fact that the limits of the right of visit and search should be more clearly defined. The need of some restrictions upon this right was proved by the acts of the volunteer fleet in the Red Sea. While there is no likelihood of reaching an agreement to surrender the belligerent right of visit and search, there is a prospect of being able so to restrict the right that it will be far less annoying to neutral commerce. It would certainly not be unreasonable to restrict the area within which the right could be exercised, so that it might not be exercised at a distance of thousands of miles from the scene of hostilities, as was done in the recent war. A reasonable radius within which the right might be exercised could, we think, be agreed upon. The mails carried by regular mail steamships should be exempt from search, as interference with these causes a disturbance to neutral business which is out of all proportion to the advantage likely to be derived by the belligerent. News that is of much use to the belligerent is now sent by cable or wireless telegraphy, not by mail. Nor should it be at all impossible to reach an agreement that ships leaving neutral <sup>Visit and search.</sup>

**Contraband  
goods.**

ports in which there were consuls of the belligerents might be examined and a certificate furnished them by such consuls which would be conclusive evidence that they carried no contraband and would exempt them from search by the belligerent warships.

There is also need of a more definite agreement as to what are contraband goods. To reach this agreement by the slow process of treaties between the different states will take too long and the disputes arising in the meantime may result in wars. That a complete agreement will be reached which will be good for all time it is useless to hope, but it is not unreasonable to expect that substantial improvement can be made in the direction of greater definiteness. Upon this point the chances are at least sufficient to warrant the attempt.

**International  
prize court.**

But of greater importance than revising the list of contraband goods is the establishment of an international court for hearing and deciding upon questions of prize. At present the situation is this: the belligerents each establish prize courts and to these the property of neutrals, as well as that of the enemy, is taken for the purpose of determining whether or not it has been rightfully captured by the warships of the belligerent whose court is deciding the question. When we consider the excitement which war always produces, the weight likely to be attached to interests as against abstract justice, and that the judge is virtually an interested party, it is useless to expect impartiality under such circumstances. For, no matter how good the intentions of the judge he is but human, and it is useless to expect from human nature a character of service for which human nature was never designed. Inasmuch, therefore, as men do not make good judges in their own



case and as patriotic men are too apt to make their country's case their own case, it would seem that it is a mere matter of justice to neutrals that a court be established for the hearing of prize cases in which the judges in a given case would not be citizens of either the belligerent or the neutral state which is concerned in the controversy. This would be no hardship or injustice to either party to the controversy and would increase immensely the chances of securing an impartial trial.

There is nothing *a priori* unreasonable or impractical about such a proposition, and it has justice to commend it. Nor does it seem likely that the proposal would meet with insurmountable opposition in an international conference. For states are gradually coming to see that their greatest interests are as neutrals, not as bel-  
Practicability of  
such a proposal.
ligerents. And, as the states would be at peace when the conference was sitting, no state would have the same incentive to oppose the establishment of such a court that it has to avail itself of its present right to establish its own prize courts after it becomes a belligerent and feels, as belligerents generally feel, that its interests and perhaps its national existence are so endangered that it should yield no legal right, the exercise of which would be a substantial advantage to it at that particular time. There may be some difference of opinion as to the details of this plan, but that it should be adopted in principle seems entirely clear.

Equally clear is it that there should be, in the interest of neutrals, an agreement as to the restrictions which should be placed upon the right of belligerents to make use of submarine or floating mines. This is a relatively new question, and, though there has been con-

**Floating and  
submarine  
mines.**

siderable expression of opinion, there cannot as yet be said to be an established legal rule. To argue that the belligerent may sow the seas broadcast with these agencies of destruction, in the hope that the warships of the other belligerent may come into contact with them and be thereby destroyed, is to lose sight entirely of the fact that neutral commerce has some rights on the open seas which must not be wholly disregarded. Such an extreme view is entirely untenable. But what restrictions are to be placed which will at once preserve to the belligerent his legitimate right to injure his enemy and also to the neutral his rights upon the common highway of all nations, is a question in the settlement of which the neutral as well as the belligerent is entitled to be heard. Whether a settlement is reached by way of a compromise or by either side yielding, it is important that a conclusion be reached so that each side may know the rights of both sides in advance, instead of being compelled to await a settlement of the matter until a controversy forces the question upon them and both are irritated and likely to appeal to the arbitrament of the sword.

**As to noncom-  
batant enemies.**

There is another standpoint from which this question of the legitimate use of floating or submarine mines may be considered, and that is from the standpoint of the rights of non-combatant enemies. Undoubtedly the belligerent has a right to resort to such means for the purpose of destroying his enemy's fighting vessels, but has he the right to subject the crews and passengers of the merchant vessels of his enemy to such dangers? To answer this question in the affirmative is to disregard the principle that war is a contest between states and to revert to the theory and practice of barbarism. To

one who is convinced that the change to the conception of war as a contest between the armed forces of the contending states, rather than between all the individuals, marks a distinct stage of progress in the laws and usages of war, a reversion to the old conception would be anything but gratifying.

The right of belligerents to destroy neutral vessels, instead of taking them in for adjudication, has again been raised by the action of Russia in sinking the Knight Commander, The Thea, and The Hipsang. That extreme circumstances may excuse the exercise of so harsh a means of protecting the rights of belligerents has for some time been claimed, conditional, however, upon compensation to the neutral for his loss. Such was the decision of Lord Stowell in the case of The Acteon (2 Dodson, 48) and The Felicity (Ibid. 281). But as there is divergence of opinion and practice as to the facts which furnish the basis for the exercise of the right and as it is contended by some that compensation is not necessary, it is evident that there is need of a definite agreement. Nor is the need of such agreement confined to the question of the right to compensation, it should include also provision for the ascertainment of this by an impartial tribunal. Though it would of course be exceedingly difficult, if not impossible, to fix in advance the circumstances justifying the right of destruction, agreement as to an equitable method of redress through an impartial tribunal should offer no insurmountable obstacles. At least this much should therefore be accomplished.

The use of wireless telegraphy by neutrals in or near the zone of hostile operations presents a new and difficult problem, one concerning which there is need of an

Destruction of  
neutral vessels  
by belligerent  
captor.

Use of wireless  
telegraphy.

agreement for the purpose of avoiding friction and preserving, in so far as possible, the rights of both neutrals and belligerents. Though the pretensions of Russia were entirely untenable that she had the right to treat as spies the newspaper correspondents seized on The Haimun, who were using this means of conveying intelligence, yet these pretensions serve to show the danger and inconvenience of having no legal provisions governing the case.

Scarcely less urgent, though not so new, is the need of determining the rights of belligerents over submarine cables owned by neutrals. This question was raised during the Spanish-American War, when Admiral Dewey cut the cable of the Eastern Extension Company within the territorial waters of the Philippines. This company, which was neutral, owned the cable between Hong Kong and Manila. It demanded of the American government compensation for its loss, and included in this the loss of income during the time the cable was cut. The Attorney-General of the United States replied, that neutral property in enemy territory is, "from its location alone, liable to damage from lawful operations of war, which this cutting is conceded to have been, and no compensation is due for such damage." But this cannot be said to have established a rule. The question may fairly be said to be still an open one and is worthy the consideration of an international conference in the hope of reaching an agreement which will be at once equitable to both parties.

We are aware that we have by no means exhausted the list of questions of international law, concerning which there is need of a more definite understanding, but we trust that we have called attention to a sufficient

Submarine  
cables.

number to make it clear that the advantage to be gained by reaching an agreement with reference to some or all of them, and thus removing causes of friction and perchance of war, is ample to warrant the most serious effort of an international conference.

## CHAPTER II.

### RECURRING NEEDS.

**Perfect code  
would in time  
become imper-  
fect.**

When, however, all the questions of international law, upon which there is at present more or less dispute, shall have been definitely settled, if such a thing were possible, the need of an occasional conference of the nations in the future will not have been brought to an end. A perfect code of international law for the twentieth century would not be a perfect code for the twenty-first or twenty-second centuries, and would no doubt in some particulars be intolerable.

**Inventions and  
changes in  
ethical stand-  
ards.**

The reason for this is to be found partly in the fact that inventions, which are reasonably sure to come, will result in changes in the commercial and industrial life of nations as well as in the arts of war; and partly in the fact that changes in ethical standards are equally sure to come. These changes will necessitate modifications in the laws to conform to the needs of a changed situation. Unless provision is made for changing the laws so as to make them harmonize with the conditions and relations which constitute the foundation upon which laws rest, a premium is placed upon disregard for law and the chances of war are multiplied.

**How inventions  
affect Interna-  
tional Law.**

Inventions such as those of gunpowder, submarine cables, wireless telegraphy, and a great many others, while they do not change the fundamental principles of war, do, nevertheless, render necessary a modification of the old rules in order to make them applicable to the new conditions. Take, for instance, a change in the effective range of cannon; if considerable, there is no

doubt but that it ought to be accompanied by a corresponding change in the rule as to territorial waters. With reference to this question past experience has amply demonstrated that a change of the marine league limit is necessary in order to protect neutrals from the consequences of hostile acts of belligerents near their shores. The change from sail to steam as a means of propelling warships has enlarged the list of contraband and there is no warrant that an equally great change may not take place in the future.

A change in ethical standards resulting in a change in the municipal law so as to make slavery unlawful in practically all nations has forced a change in the law of nations with respect to the power of the belligerent over prisoners of war. Changed ethical standards have also effected a change in the right of the belligerent over the persons and property of non-combatants. They have also reduced the list of just causes of war and have, to some extent at least, compelled a resort to amicable methods of adjusting disputes. They have forced a change of the rule as to the legitimate power of the military occupant, and also of the conqueror.

Examples of changes in ethical standards and their effect.

As no one will contend that ethical standards have suddenly become fixed and immutable, it needs no argument to prove that in the future, as in the past, there will be need for changes in international law. Human nature is a fairly constant factor and, if it has necessitated changes in international law in the past, we may be reasonably sure that it will in the future.

Necessity for change fundamental.

But the necessity for change, due to the causes which we have suggested, is by no means peculiar to international law. We find precisely the same thing illustrated in constitutional law, and, indeed, in all laws that are

Analogous experience in constitutional law.

not the product of an omniscient mind. No nation has yet devised a constitution so perfect as to meet its requirements for a century without need of being amended, and in not a few cases the need has been so great as to force a modification at whatever cost.

**Experience of  
American com-  
monwealths in  
constitution  
making.**

The experience of the American commonwealths in constitution making has been a most interesting and valuable one to study. From a careful study of this rich field of experience we reach the conclusion that the economic and ethical changes which take place during the lifetime of a generation are usually sufficient to render substantial modification in the constitution of a state advisable, though perhaps not imperative. Even the Constitution of the United States, which has been denominated by Gladstone "The wonder of the age," has had to undergo important modifications in order to bring it into harmony with changed ethical standards and economic conditions.

**Provision for  
changes in con-  
stitutional law.**

This principle is so well recognized in the realm of constitutional law that provision is made in advance for securing consent to a change whenever, in the judgment of a majority, changed conditions or changed conceptions have rendered a modification in the law sufficiently desirable to warrant the trouble and disadvantages due to a change. A constitution which contains no provision for its own amendment would be considered as fatally defective. This was the case with the Articles of Confederation, which had to be amended by revolution or not at all.

Whether we judge upon the basis of experience or that of analogy, we reach the same conclusion, namely, that there will be a recurring need of modifications in international law. The question, then, is simply what pro-



vision shall be made for meeting this need. The present method is both too slow and too indefinite, as compared with the method of changing by means of an international conference to be convoked at least once during the lifetime of a generation, and oftener if circumstances warrant it, which method would furnish a relatively easy and inexpensive method of securing the consent of nations to necessary changes in the law governing them in their relations to each other. In the absence of any other available plan, the needs are certainly sufficient to warrant the adoption of this one.

Question is simply one of what provision shall be made for changing Int. law.



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